

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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JAY RUDY,

Plaintiff,

Civil Action No.  
9:10-CV-00370 (MAD/DEP)

v.

AUBURN CORRECTIONAL FACILITY;  
N. O'CONNOR-RYERSON, Medical, Auburn  
Correctional Facility; and DANIEL BURNS,<sup>1</sup>  
Psychiatric, Auburn Correctional Facility,

Defendants.

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APPEARANCES:

FOR PLAINTIFF:

JAY RUDY, *Pro Se*  
09A4865  
Elmira Correctional Facility  
Box 51  
Comstock, NY 12821

OF COUNSEL:

FOR DEFENDANTS:

HON. ERIC T. SCHNEIDERMAN  
Attorney General of  
the State of New York  
The Capitol  
Albany, NY 12224

RICHARD LOMBARDO, ESQ.  
Assistant Attorney General

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<sup>1</sup> Both plaintiff's complaint and the court's records list this defendant's name as "Dean Burns". From the record now before the court, however, it appears that the person intended to be named as a defendant is Daniel Berns, who in fact has acknowledged service and appeared in the action. See Dkt. Nos. 17, 30, 36. The clerk will therefore be directed to amend the docket sheet to reflect the correct spelling of this defendant's name as "Daniel Berns".

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

REPORT AND RECOMMENDATION

*Pro se* plaintiff Jay Rudy, a New York State prison inmate, has commenced this action pursuant to 42 U.S.C. § 1983 against the Auburn Correctional Facility (“Auburn”) and two individuals employed at the prison alleging deprivation of his civil rights. Though difficult to decipher, plaintiff’s complaint appears to center upon the alleged refusal of medical personnel at the facility to provide him with proper medical treatment and the denial of grievances voicing complaints regarding those failures. Plaintiff’s complaint requests injunctive and monetary relief, including an order directing that he be transferred out of Auburn.

In response to plaintiff’s complaint defendants have moved seeking its dismissal for failure to state a claim upon which relief may be granted, additionally asserting their entitlement to qualified immunity from suit. For the reasons set forth below, I recommend that the motion be granted, but that plaintiff be permitted leave to amend his complaint to assert an Eighth Amendment claim for denial of proper medical treatment.

I. BACKGROUND<sup>2</sup>

Plaintiff is a prison inmate entrusted to the care and custody of the New York State Department of Corrections and Community Supervision (“DOCCS”) (formerly the New York State Department of Correctional Services, or “DOCS”). See *generally* Complaint (Dkt. No. 1). While the plaintiff appears currently to be confined elsewhere, at the times relevant to his claims he was designated to the Auburn Correctional Facility (“Auburn”), located in Auburn, New York.<sup>3</sup> *Id.*

Although far from clear, plaintiff’s claims appear to be based upon an alleged failure of prison officials to provide him with what he deems to be proper medical care. The facts surrounding those claims are not easily

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<sup>2</sup> In light of the procedural posture of this case, the following recitation is drawn principally from plaintiff’s amended complaint, the contents of which have been accepted as true for purposes of the pending motion. See *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200 (2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 1965 (2007)); see also *Cooper v. Pate*, 378 U.S. 546, 546, 84 S. Ct. 1733, 1734 (1964).

<sup>3</sup> The address currently listed on the court’s docket sheet, showing that Rudy is presently confined in the Great Meadow Correctional Facility, comes from a change of address notice filed by the plaintiff on September 23, 2010. See Dkt. No. 32. According to publically available information located upon a web site maintained by the DOCCS, however, it appears that he is now incarcerated at the Elmira Correctional Facility, located in Elmira, New York. Accordingly, the clerk will be directed to mail copies of this report and recommendation to the plaintiff at both facilities. If in fact the plaintiff was transferred but has failed to notifying the court, he is reminded of his obligation under this court’s local rules to notify the court and defendants’ counsel promptly of all of address changes. See N.D.N.Y.L.R. 10.1 (c)(2).

discerned from his complaint. In the portion of the form complaint calling for a recitation of the salient facts, Rudy states the following:

I had two survzers [sic] since I have been here at Auburn  
Been writing grievance [sic] since Nov. 2009 and know help  
from either one of medical or mental health department or the  
superintendent and here are grievances to show everything  
plus I am still doing grievance [sic] to this day and they don't  
care at all here at Auburn facility There [sic] doing nothing  
about it and been putting sick-call slip [sic] in every day since I  
got to this facility and still nothing is happened [sic] My back  
and neck are getting worst [sic] not better.

Complaint (Dkt. No. 1) ¶ 6. Plaintiff's complaint also references several grievances which are attached, addressing such matters as his request to be seen by a physician, his application for a transfer to another prison facility, and the failure of food service personnel at the facility to provide him with a proper diet. See *id.*, Attachments.

## II. PROCEDURAL HISTORY

Plaintiff commenced this action on March 18, 2010.<sup>4</sup> (Dkt. No. 1). Plaintiff's complaint names the Auburn Correctional Facility, N. O'Connor-Ryerson, and Daniel Berns (sued as Dean Burns) as defendants, and asserts what appears to be a single claim of deliberate medical

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<sup>4</sup> The action was initially filed in the Western District of New York, but was transferred to this district shortly after commencement. Dkt. No. 3.

indifference in violation of the Eighth Amendment to the United States Constitution, seeking as relief both “pay” and a transfer out of Auburn.

On October 13, 2010, defendants responded to plaintiff’s complaint by moving pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for its dismissal for failure to state a claim upon which relief may be granted. In their motion defendants assert that 1) plaintiff’s complaint fails to state a plausible claim of deliberate medical indifference; 2) plaintiff’s damage claim against Auburn is barred by the Eleventh Amendment; 3) plaintiff’s transfer out of Auburn has rendered his request for injunctive relief moot; and 4) in any event they are entitled to qualified immunity. Plaintiff has responded to defendants’ motion by filing what appears to be a reprint of an article entitled *Medical Care in Prison: Judicial Remedies For Negligent Or Unconstitutional Treatment*, published by PRISONERS’ LEGAL SERVICES OF NEW YORK (Rev. 8/12/92). See Dkt. No. 37.

Defendants’ motion, which is now ripe for determination, has been referred to me for the issuance of a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72.3(c). See Fed. R. Civ. P. 72(b).

III. DISCUSSION

A. Dismissal Motion Standard

A motion to dismiss a complaint, brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, calls upon a court to gauge the facial sufficiency of that pleading, utilizing as a backdrop a pleading standard which, though unexacting in its requirements, “demands more than an unadorned, the-defendant-unlawfully-harmed me accusation” in order to withstand scrutiny. *Ashcroft v. Iqbal*, \_\_\_ U.S., \_\_\_, \_\_\_, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555, 127 S. Ct. 1955 (2007)). Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). *Id.* While modest in its requirement, that rule commands that a complaint contain more than mere legal conclusions; “[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Ashcroft*, 129 S. Ct. at 1950.

To withstand a motion to dismiss, a complaint must plead sufficient facts which, when accepted as true, state a claim which is plausible on its face. *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) (citing

*Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974). As the Second Circuit has observed, “[w]hile *Twombly* does not require heightened fact pleading of specifics, it does require enough facts to ‘nudge [plaintiffs’] claims across the line from conceivable to plausible.” *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974).

In deciding a Rule 12(b)(6) dismissal motion, the court must accept the material facts alleged in the complaint as true and draw all inferences in favor of the non-moving party. *Cooper v. Pate*, 378 U.S. 546, 546, 84 S. Ct. 1723, 1734 (1964); *Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 300 (2d Cir. 2003), *cert. denied*, 540 U.S. 823, 124 S. Ct. 153 (2003); *Burke v. Gregory*, 356 F. Supp. 2d 179, 182 (N.D.N.Y. 2005) (Kahn, J.). The burden undertaken by a party requesting dismissal of a complaint under Rule 12(b)(6) is substantial; the question presented by such a motion is not whether the plaintiff is likely ultimately to prevail, “but whether the claimant is entitled to offer evidence to support the claims.” *Log On America, Inc. v. Promethean Asset Mgmt. L.L.C.*, 223 F. Supp. 2d 435, 441 (S.D.N.Y. 2001) (quoting *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995)) (citations and quotations omitted).

When assessing the sufficiency of a complaint against the backdrop, particular deference should be afforded to a *pro se* litigant whose complaint merits a generous construction by the court when determining whether it states a cognizable cause of action. *Erickson*, 551 U.S. at 94, 127 S. Ct. at 2200 (2007) (“[A] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers”) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292 (1976) (internal quotations omitted)); *Davis v. Goord*, 320 F.3d 346, 350 (2d Cir. 2003) (citation omitted); *Donhauser v. Goord*, 314 F. Supp.2d 119, 121 (N.D.N.Y. 2004) (Hurd, J.).

B. Analysis of Plaintiff’s Complaint

In their motion defendants argue that when measured against the backdrop of the prevailing Rule 12(b)(6) standard, plaintiff’s complaint falls far short of both demonstrating the existence of a plausible claim of medical indifference and disclosing the role of each defendant in that deprivation.

Claims of intentional disregard of medical needs fall under the umbrella of the protection from the imposition of cruel and unusual punishment afforded by the Eighth Amendment. *Estelle*, 429 U.S. at 102,

104, 97 S. Ct. at 290, 291. The Eighth Amendment, though not mandating comfortable prisons, does not tolerate inhumane treatment of those in confinement. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976 (1994) (citing *Rhodes v. Chapman*, 452 U.S. 337, 349, 101 S.Ct. 2392, 2400 (1981)). To satisfy their obligations under the Eighth Amendment, prison officials must “ensure that inmates receive adequate food, shelter, and medical care, and must take reasonable measures to guarantee the safety of inmates.” *Farmer*, 511 U.S. at 832, 114 S. Ct. at 1976 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27, 104 S. Ct. 3194, 3200 (1984)) (internal quotations omitted).

A claim alleging that prison officials have violated the Eighth Amendment by inflicting cruel and unusual punishment must satisfy both objective and subjective requirements. *Wright v. Goord*, 554 F.3d 255, 268 (2d Cir. 2009); *Price v. Reilly*, No. 07-CV-2634 (JFB/ARL), 2010 WL 889787, at \*7-8 (E.D.N.Y. Mar. 8, 2010).<sup>5</sup> Addressing the objective element, to prevail a plaintiff must demonstrate a violation sufficiently serious by objective terms, “in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists.” *Hathaway*

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<sup>5</sup> Copies of all unreported decisions cited in this document have been appended for the convenience of the *pro se* plaintiff.

*v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996). Analysis of the objective, “sufficiently serious,” requirement of an Eighth Amendment medical indifference claim begins with an inquiry into “whether the prisoner was actually deprived of adequate medical care . . .”, and centers upon whether prison officials acted reasonably in treating the plaintiff. *Salahuddin v. Goord*, 467 F.3d at 263, 279 (2d Cir. 2006). A second prong of the objective test addresses whether the inadequacy in medical treatment was sufficiently serious. *Id.* at 280. If there is a complete failure to provide treatment, the court must look to the seriousness of the inmate’s medical condition. *Smith v. Carpenter*, 316 F.3d 178, 185-86 (2d Cir. 2003). If, on the other hand, the complaint alleges that treatment was provided but was inadequate, the seriousness inquiry is more narrowly confined to that alleged inadequacy, rather than focusing upon the seriousness of the prisoner’s medical condition. *Salahuddin*, 467 F.3d at 280.

The second, subjective, requirement for establishing an Eighth Amendment medical indifference claim mandates a showing of a sufficiently culpable state of mind, or deliberate indifference, on the part of the defendant. *Salahuddin*, 467 F.3d at 280 (citing *Wilson v. Seiter*, 501

U.S. 294, 300, 111 S.Ct. 2321, 2325 (1991)). Deliberate indifference, in a constitutional sense, exists if an official “knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [or she] must also draw the inference.” *Farmer*, 511 U.S. at 837, 114 S.Ct. at 1979; *Leach v. Dufrain*, 103 F. Supp. 2d 542, 546 (N.D.N.Y. 2000) (Kahn, J.) (citing *Farmer*); *Waldo v. Goord*, No. 97-CV-1385, 1998 WL 713809, at \*2 (N.D.N.Y. Oct. 1, 1998) (Kahn, J. and Homer, M.J.) (same). Deliberate indifference is a mental state equivalent to subjective recklessness as the term is used in criminal law. *Salahuddin*, 467 F.3d at 280 (citing *Farmer*, 511 U.S. at 839-40, 114 S. Ct. 1970).

The skeletal allegations of plaintiff’s form complaint fall well short of setting forth facts to establish a plausible claim meeting both the objective and subjective requirements under the Eighth Amendment. For example, little is disclosed in plaintiff’s complaint and the supporting exhibits concerning the nature of his neck and back conditions and their severity. Plaintiff’s complaint suggests that while he has received treatment from prison medical personnel and/or outside sources for his neck and back,

including surgery, he is dissatisfied with the results and frustrated that the conditions have not improved. Such disagreement with treatment regimens and disappointment with the results, however, even if proven, does not rise to a level sufficient to support an Eighth Amendment claim. *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864, 867 (2d Cir. 1970) (citation omitted); see also *Estelle*, 429 U.S. at 107, 97 S. Ct. at 293; *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998) (citation omitted); *Rosales v. Coughlin*, 10 F. Supp. 2d 261, 264 (W.D.N.Y. 1998) (citation omitted).

Plaintiff's complaint also fails to disclose the precise involvement on the part of the two named individual defendants, Nurse O'Connor-Ryerson and Daniel Berns, in the alleged deprivation of treatment, and lacks factual assertions plausibly establishing that those defendants both knew of and disregarded an excessive risk to plaintiff's health or safety. Based upon this failure, plaintiff's complaint does not meet the subjective prong of the prevailing deliberate indifference standard. *Caldwell v. Gettmann*, No. 9:09 CV 580, 2010 WL 4163034, at \*8 (N.D.N.Y. Jul 23, 2010) (Peebles, M.J.), *report and recommendation adopted*, 2010 WL 3430036 (Aug. 27, 2010) (Hurd, J.).

In light of plaintiff's failure to plead a plausible claim satisfying both the objective and subjective elements of the governing test, I therefore recommend that plaintiff's Eighth Amendment claim be dismissed for failure to state a plausible deliberate medical indifference cause of action. *Caldwell*, 2010 WL 4163034, at \*8.

C. Eleventh Amendment

In their motion defendants also seek dismissal of plaintiff's claim for money damages against the Auburn Correctional Facility, arguing that as a branch of state government, the DOCCS and its prisons are immune from such suits.

The Eleventh Amendment protects a state against suits brought in federal court by citizens of that state, regardless of the nature of the relief sought. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 3057-58 (1978). This absolute immunity which states enjoy under the Eleventh Amendment extends both to state agencies, and in favor of state officials sued for damages in their official capacities when the essence of the claim involved seeks recovery from the state as the real party in interest.<sup>6</sup>

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<sup>6</sup> In a broader sense, this portion of defendants' motion implicates the sovereign immunity enjoyed by the State. As the Supreme Court has reaffirmed relatively recently, the sovereign immunity enjoyed by the states is deeply rooted, having been recognized in this country even prior to ratification of the Constitution, and is neither dependent upon nor defined by the Eleventh Amendment. *Northern Ins. Co. of New*

*Richards v. State of New York Appellate Division, Second Dep't*, 597 F. Supp. 689, 691 (E.D.N.Y. 1984) (citing *Pugh and Cory v. White*, 457 U.S. 85, 89-91, 102 S. Ct. 2325, 2328-29 (1982)).

As a part of the DOCCS, a New York State agency, Auburn enjoys immunity from suit for monetary damages under the Eleventh Amendment. *Rivera v. Goord*, 119 F. Supp. 2d 327, 336 (S.D.N.Y. 2000). I therefore recommend dismissal of plaintiff's damage claim against that facility.

D. Transfer Request

In their motion defendants also attack plaintiff's request for injunctive relief, in the form of an order directing his transfer out of Auburn, in light of the fact that he is no longer confined within that facility.

It appears from the docket sheet that defendants are correct that plaintiff has been transferred out of Auburn and into another correctional facility. Accordingly, even if it were appropriate for the court to order the DOCCS to transfer the plaintiff to another facility, that request has been rendered moot. See *Day v. Chaplin*, 354 Fed. App'x 472, 473-74 (2d Cir. 2009) (citing *Mawhinney v. Henderson*, 542 F.2d 1, 2 (2d Cir. 1976) (finding that inmates claim for injunctive relief, relating to treatment at a particular correctional facility, seeking a transfer from that facility was

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*York v. Chatham County*, 547 U.S. 189, 193, 126 S. Ct. 1689, 1693 (2006).

rendered moot in light of the fact that the inmate was no longer confined there)) (cited in accordance with Fed. R. App. Proc. 32.1 not for precedential value but to show the continuing vitality of *Mawhinney*).

E. Whether to Permit Amendment

Ordinarily, a court should not dismiss a complaint filed by a *pro se* litigant without granting leave to amend *at least* once if there is any indication that a valid claim might be stated. *Branum v. Clark*, 927 F.2d 698, 704-05 (2d Cir.1991) (emphasis added); see also Fed. R. Civ. P. 15(a) (leave to amend “shall be freely given when justice so requires”); see also *Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986, 1003 (E.D.N.Y.1995) (leave to replead granted where court could not say that under no circumstances would proposed claims provide a basis for relief). The court must next determine whether plaintiff is entitled to the benefit of this general rule, given the procedural history of the case.

That portion of plaintiff’s complaint alleging that the individual defendants were deliberately indifference to his serious medical needs is being dismissed based upon the paucity of specific allegations of fact to show both the existence, objectively, of a serious medical need and defendants’ subjective awareness of and failure to provide adequate

treatment for that need. At this juncture it is not at all clear that, if given the opportunity, plaintiff nonetheless could not assert a plausible deliberate indifference claim against those defendants. I therefore recommend that the plaintiff be afforded an opportunity to amend his complaint in an effort to cure the deficiencies noted.

When amending, plaintiff should take note of the fact that “complaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning.” *Hunt v. Budd*, 895 F. Supp. 35, 38 (N.D.N.Y. 1995) (McAvoy, C.J.) (citing *Barr v. Abrams*, 810 F.2d 358, 363 (2d Cir. 1987) (other citations omitted)); *Pourzandvakil v. Humphry*, No. 94-CV-1594, 1995 U.S. Dist. LEXIS 7136, at \*24-25 (N.D.N.Y. May 22, 1995) (Pooler, D.J.) (citation omitted). In his amended complaint, plaintiff therefore should clearly set forth the facts, including the wrongful acts that give rise to the claim, the dates, times, and places of the alleged acts, and the individuals who committed each alleged wrongful act. Such an amended complaint, must replace the existing second amended complaint and must be a wholly integrated and complete pleading that does not rely upon or

incorporate by reference any pleading or document previously filed with the court. See *Harris v. City of N.Y.*, 186 F.3d 243, 249 (2d Cir. 1999) (citing *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)); Fed. R. Civ. P. 10(a). Additionally, the amended complaint should specifically allege facts indicating the involvement of each of the named defendants in the constitutional deprivations alleged in sufficient detail to establish they were tangibly connected to those deprivations. See *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986).

Unlike his medical indifference cause of action, which could ostensibly be stated with the requisite degree of plausibility, plaintiff's claims against the Auburn Correctional Facility and his request for injunctive relief directing his transfer out of Auburn stand on different footing. The court is convinced that even if given the opportunity, plaintiff could not state a plausible claim against the Auburn Correctional Facility, nor would he be able to cure the mootness of his request for injunctive relief based upon his transfer out of Auburn. An opportunity to amend is not required where "the problem with [plaintiff's] causes of action is substantive" such that "[b]etter pleading will not cure it." *Cuoco v.*

*Moritsugu*, 222 F.3d 99, 112 (Cir. 2000) (finding that repleading will be futile) (citation omitted).

Based upon the foregoing, I therefore recommend that plaintiff be granted leave to amend with regard to his Eighth Amendment deliberate indifference claim. I further recommend, however, that his damage claim against the Auburn Correctional Facility and his claim for injunctive relief be dismissed, without leave to amend.

IV. SUMMARY AND RECOMMENDATION

In light of the lack of factual allegations which would permit the court to gauge whether he has set forth a plausible medical indifference claim, plaintiff's complaint should be dismissed, with leave to replead except as to plaintiff's damage claim against the Auburn Correctional Facility and his request for injunctive relief seeking a prison transfer. As to those claims, plaintiff's complaint is subject to dismissal without leave to replead based upon the court's determination that plaintiff cannot set forth a set of facts which would entitle him to those forms of relief.<sup>7</sup>

Based upon the foregoing it is hereby respectfully

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<sup>7</sup> In light of the recommendation concerning dismissal of plaintiff's claims on the merits, I have not addressed defendants' alternative argument seeking dismissal on the basis of qualified immunity.

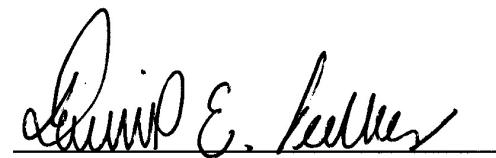
RECOMMENDED, that defendants' motion to dismiss (Dkt. No. 36) be GRANTED, and that plaintiff's complaint be DISMISSED, with leave to replead with respect to his Eighth Amendment deliberate indifference claim, but without leave to replead insofar as he seeks damages against the Auburn Correctional Facility and an order directing his transfer out of that facility; and it is further

ORDERED, that the clerk amend the court's records to correctly identify the defendant Dean Burns as "Daniel Berns".

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections must be filed with the clerk of the court within FOURTEEN days of service of this report. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72 Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993).

It is hereby further ORDERED that the clerk of the court serve a copy of this report and recommendation upon the parties in accordance with this court's local rules.

Dated: August 9, 2011  
Syracuse, NY

  
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David E. Peebles  
U.S. Magistrate Judge

697 F.Supp.2d 344  
(Cite as: 697 F.Supp.2d 344)

C

United States District Court,  
E.D. New York.  
Anthony PRICE, Plaintiff,  
v.  
Sheriff Edward REILLY, Kim Edwards, RN III, Perry  
Intal, Mary Sullivan, RN, Dr. Benjamin Okonta, MD,  
and Nassau University Medical Center, Defendants.  
**No. 07-CV-2634 (JFB)(ARL).**

March 8, 2010.

**Background:** Pro se inmate, who suffered from end stage renal disease requiring dialysis, filed § 1983 action against sheriff, nurse practitioner, physician, and medical center, alleging violations of the Eighth Amendment for defendants' failure to provide adequate medical care. Defendants moved for summary judgment.

**Holdings:** The District Court, [Joseph F. Bianco](#), J., held that:

- (1) there was no evidence that administrative remedy was available to inmate;
- (2) prison medical staff's modification of inmate's medication dosage did not constitute deliberate indifference to his medical needs;
- (3) prison's failure to provide food with inmate's medication was not sufficiently serious to satisfy objective prong of test for deliberate indifference to serious medical needs;
- (4) medical staff did not act with culpable intent to consciously disregard inmate's serious medical needs;
- (5) genuine issue of material fact as to whether prison medical staff was aware of, and consciously disregarded inmate's request for a kidney transplant test precluded summary judgment;
- (6) genuine issue of material fact as to whether inmate's shoulder pain was a serious medical condition precluded summary judgment;
- (7) sheriff was not liable under § 1983; but
- (8) genuine issues of material fact precluded summary

judgment on § 1983 liability of registered nurse and doctor.

Motion granted in part and denied in part.

West Headnotes

[\[1\] Federal Civil Procedure 170A](#)  **2547.1**

[170A](#) Federal Civil Procedure

[170AXVII](#) Judgment

[170AXVII\(C\)](#) Summary Judgment

[170AXVII\(C\)3](#) Proceedings

[170Ak2547](#) Hearing and Determination

[170Ak2547.1](#) k. In general. [Most Cited Cases](#)

Generally, plaintiffs' failure to respond or contest facts set forth by defendants in their statement of facts, submitted in support of summary judgment, constitutes admission of those facts, and facts are accepted as undisputed under local rule. [U.S.Dist.Ct.Rules S.D.N.Y., Civil Rule 56.1](#).

[\[2\] Federal Civil Procedure 170A](#)  **25**

[170A](#) Federal Civil Procedure

[170AI](#) In General

[170AI\(B\)](#) Rules of Court in General

[170AI\(B\)1](#) In General

[170Ak25](#) k. Local rules of District Courts.

[Most Cited Cases](#)

District court has broad discretion to determine whether to overlook a party's failure to comply with local court rules.

[\[3\] Federal Civil Procedure 170A](#)  **2547.1**

[170A](#) Federal Civil Procedure

[170AXVII](#) Judgment

[170AXVII\(C\)](#) Summary Judgment

[170AXVII\(C\)3](#) Proceedings

[170Ak2547](#) Hearing and Determination

[170Ak2547.1](#) k. In general. [Most Cited](#)

697 F.Supp.2d 344  
(Cite as: 697 F.Supp.2d 344)

Cases

District court, when analyzing motion for summary judgment by sheriff and medical personnel in inmate's pro se action alleging cruel and unusual punishment, would treat as admitted only those facts in defendants' statement of facts that were supported by admissible evidence and not controverted by other admissible evidence in the record, given that inmate was acting pro se, he failed to file and serve a response to defendant's statement, but he had identified arguments and factual assertions in statement with which he disagreed. [U.S.C.A. Const.Amend. 8](#); [U.S.Dist.Ct.Rules S.D.N.Y., Civil Rule 56.1](#).

**[4] Federal Civil Procedure 170A**  657.5(1)

[170A](#) Federal Civil Procedure

[170AVII](#) Pleadings and Motions

[170AVII\(A\)](#) Pleadings in General

[170Ak654](#) Construction

[170Ak657.5](#) Pro Se or Lay Pleadings

[170Ak657.5\(1\)](#) k. In general. [Most Cited Cases](#)

Cases

Court must construe pro se complaint broadly, and interpret it to raise the strongest arguments that it suggests.

**[5] Attorney and Client** 45  62

[45](#) Attorney and Client

[45II](#) Retainer and Authority

[45k62](#) k. Rights of litigants to act in person or by attorney. [Most Cited Cases](#)

**Federal Civil Procedure 170A**  657.5(1)

[170A](#) Federal Civil Procedure

[170AVII](#) Pleadings and Motions

[170AVII\(A\)](#) Pleadings in General

[170Ak654](#) Construction

[170Ak657.5](#) Pro Se or Lay Pleadings

[170Ak657.5\(1\)](#) k. In general. [Most Cited Cases](#)

Cases

**Federal Civil Procedure 170A**  2546

[170A](#) Federal Civil Procedure

[170AXVII](#) Judgment

[170AXVII\(C\)](#) Summary Judgment

[170AXVII\(C\)3](#) Proceedings

[170Ak2542](#) Evidence

[170Ak2546](#) k. Weight and sufficiency.

Most Cited Cases

Though pro se litigant's pleadings and other submissions are afforded wide latitude, pro se party's conclusory assertions, completely unsupported by evidence, are not sufficient to defeat motion for summary judgment.

**[6] Civil Rights** 78  1304

[78](#) Civil Rights

[78III](#) Federal Remedies in General

[78k1304](#) k. Nature and elements of civil actions.

Most Cited Cases

To prevail on a claim under § 1983, a plaintiff must show: (1) deprivation of any rights, privileges, or immunities secured by the Constitution and its laws, (2) by a person acting under the color of state law. [42 U.S.C.A. § 1983](#).

**[7] Prisons** 310  317

[310](#) Prisons

[310II](#) Prisoners and Inmates

[310II\(H\)](#) Proceedings

[310k316](#) Exhaustion of Other Remedies

[310k317](#) k. In general. [Most Cited Cases](#)

In order to determine if prisoner exhausted his administrative remedies prior to commencement of lawsuit, as required by PLRA, court must first establish from a legally sufficient source that an administrative remedy is applicable, and that the particular complaint does not fall within an exception. Prison Litigation Reform Act of 1995, § 101(a), [42 U.S.C.A. § 1997e\(a\)](#).

**[8] Prisons** 310  313

[310](#) Prisons

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[310II](#) Prisoners and Inmates

[310II\(H\)](#) Proceedings

[310k307](#) Actions and Litigation

[310k313](#) k. Trial. [Most Cited Cases](#)

Whether administrative remedy was available to prisoner in a particular prison or prison system, and whether such remedy was applicable to grievance underlying prisoner's suit, for purpose of PLRA's exhaustion requirement, are not questions of fact; rather, such issues either are, or inevitably contain, questions of law. Prison Litigation Reform Act of 1995, § 101(a), [42 U.S.C.A. § 1997e\(a\)](#).

[\[9\] Civil Rights](#) 78  1319

[78 Civil Rights](#)

[78III](#) Federal Remedies in General

[78k1314](#) Adequacy, Availability, and Exhaustion of State or Local Remedies

[78k1319](#) k. Criminal law enforcement; prisons.

[Most Cited Cases](#)

Sheriff and prison medical staff provided no evidence that an administrative remedy was available to inmate who suffered from end stage renal disease, and who sought, but did not receive, medical testing to determine if he was a candidate for kidney transplant, and thus inmate's [§ 1983](#) action alleging violations of Eighth Amendment would not be dismissed for his failure to exhaust administrative remedies under PLRA; defendants failed to establish procedural framework for grievance resolution at the prison or the availability of any administrative remedies for prisoner's situation. [U.S.C.A. Const. Amend. 8](#); Prison Litigation Reform Act of 1995, § 101(a), [42 U.S.C.A. § 1997e\(a\)](#).

[\[10\] Sentencing and Punishment](#) 350H  1533

[350H](#) Sentencing and Punishment

[350HVII](#) Cruel and Unusual Punishment in General

[350HVII\(H\)](#) Conditions of Confinement

[350Hk1533](#) k. Deliberate indifference in general. [Most Cited Cases](#)

Test for determining whether prison official's actions or omissions rise to level of "deliberate indifference" in violation of the Eighth Amendment, as will allow recovery by prisoner in federal civil rights action, is twofold: first, prisoner must demonstrate that he is incarcerated under

conditions posing substantial risk of serious harm, and second, prisoner must demonstrate that defendant prison officials possessed sufficient culpable intent. [U.S.C.A. Const. Amend. 8](#); [42 U.S.C.A. § 1983](#).

[\[11\] Sentencing and Punishment](#) 350H  1533

[350H](#) Sentencing and Punishment

[350HVII](#) Cruel and Unusual Punishment in General

[350HVII\(H\)](#) Conditions of Confinement

[350Hk1533](#) k. Deliberate indifference in general. [Most Cited Cases](#)

Second prong of test for determining whether prison officials acted with deliberate indifference to rights of prisoners in violation of the Eighth Amendment, that of "culpable intent," in turn involves two-tier inquiry; specifically, prison official has sufficient culpable intent if he has knowledge that inmate faces substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate harm. [U.S.C.A. Const. Amend. 8](#).

[\[12\] Sentencing and Punishment](#) 350H  1546

[350H](#) Sentencing and Punishment

[350HVII](#) Cruel and Unusual Punishment in General

[350HVII\(H\)](#) Conditions of Confinement

[350Hk1546](#) k. Medical care and treatment. [Most Cited Cases](#)

Mere fact that an inmate's underlying disease is a "serious medical condition" does not mean that prison staff's allegedly incorrect treatment of that condition automatically poses an "objectively serious health risk," in violation of Eighth Amendment. [U.S.C.A. Const. Amend. 8](#).

[\[13\] Prisons](#) 310  192

[310](#) Prisons

[310II](#) Prisoners and Inmates

[310II\(D\)](#) Health and Medical Care

[310k191](#) Particular Conditions and Treatments

[310k192](#) k. In general. [Most Cited Cases](#)

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**Sentencing and Punishment 350H**  1546

**350H** Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General  
350HVII(H) Conditions of Confinement  
350Hk1546 k. Medical care and treatment. Most Cited Cases

Even though inmate's end stage renal disease requiring dialysis was serious medical condition, prison medical staff did not act with deliberate indifference to inmate's medical needs in violation of his Eighth Amendment rights by modifying his medication dosage, since reduction in medication levels posed no objectively serious health risk to inmate; only injury inmate suffered was an increase in phosphorous levels, which was correctable, and a slight rash. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

**[14] Prisons 310**  192

**310** Prisons

310II Prisoners and Inmates  
310II(D) Health and Medical Care  
310k191 Particular Conditions and Treatments  
310k192 k. In general. Most Cited Cases

**Sentencing and Punishment 350H**  1546

**350H** Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General  
350HVII(H) Conditions of Confinement  
350Hk1546 k. Medical care and treatment. Most Cited Cases

Even though inmate's prescriptions indicated that his medications for renal disease were to be taken with meals, prison officials' failure to provide food with the medication was not sufficiently serious to satisfy objective prong of test for deliberate indifference to inmate's serious medical needs, in violation of Eighth Amendment; inmate did not suffer any harm from taking medicine without food. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

**[15] Sentencing and Punishment 350H**  1546

**350H** Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General  
350HVII(H) Conditions of Confinement  
350Hk1546 k. Medical care and treatment. Most Cited Cases

An inmate's mere disagreement with prison officials' prescribed medication dosage is insufficient as a matter of law to establish officials' "deliberate indifference" to his medical needs, in violation of the Eighth Amendment. U.S.C.A. Const.Amend. 8.

**[16] Prisons 310**  192

**310** Prisons

310II Prisoners and Inmates  
310II(D) Health and Medical Care  
310k191 Particular Conditions and Treatments  
310k192 k. In general. Most Cited Cases

**Sentencing and Punishment 350H**  1546

**350H** Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General  
350HVII(H) Conditions of Confinement  
350Hk1546 k. Medical care and treatment. Most Cited Cases

Even though inmate disagreed with medical treatment he received at prison, medical staff did not act with culpable intent to consciously disregard inmate's serious medical needs, in violation of his Eighth Amendment rights, by adjusting the dosage levels of his prescription medication for renal disease; dosage inmate received adequately treated his condition, he suffered no injury from modification of dosage other than increased phosphorous levels, and officials changed dosage to correct those levels. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

**[17] Federal Civil Procedure 170A**  2491.5

**170A** Federal Civil Procedure

170AXVII Judgment  
170AXVII(C) Summary Judgment  
170AXVII(C)2 Particular Cases  
170Ak2491.5 k. Civil rights cases in

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general. [Most Cited Cases](#)

Genuine issue of material fact as to whether prison medical staff was aware of, and consciously disregarded inmate's request for a kidney transplant test, precluded summary judgment in inmate's [§ 1983](#) action alleging officials' deliberate indifference to his medical needs, in violation of Eighth Amendment. [U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.](#)

[\[18\] Sentencing and Punishment 350H](#)  1546

[350H](#) Sentencing and Punishment

[350H](#)VII Cruel and Unusual Punishment in General  
[350H](#)VII(H) Conditions of Confinement  
[350H](#)k1546 k. Medical care and treatment. [Most Cited Cases](#)

An inmate's chronic pain can constitute a "serious medical condition" for purposes of claim of deliberate indifference to a serious medical need under the Eighth Amendment. [U.S.C.A. Const.Amend. 8;](#)

[\[19\] Federal Civil Procedure 170A](#)  2491.5

[170A](#) Federal Civil Procedure

[170A](#)XVII Judgment  
[170A](#)XVII(C) Summary Judgment  
[170A](#)XVII(C)2 Particular Cases  
[170A](#)k2491.5 k. Civil rights cases in general. [Most Cited Cases](#)

Genuine issue of material fact as to whether inmate's shoulder pain was a serious medical condition, and whether prison medical staff acted with deliberate indifference by failing to prescribe pain medication or take x-rays, despite inmate's ongoing complaints, precluded summary judgment, in inmate's [§ 1983](#) Eighth Amendment claims against medical staff. [U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.](#)

[\[20\] Civil Rights 78](#)  1355

[78](#) Civil Rights

[78](#)III Federal Remedies in General  
[78k1353](#) Liability of Public Officials  
[78k1355](#) k. Vicarious liability and respondeat

superior in general; supervisory liability in general. [Most Cited Cases](#)

Supervisor liability in [§ 1983](#) action can be shown in one or more of the following ways: (1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring. [42 U.S.C.A. § 1983.](#)

[\[21\] Civil Rights 78](#)  1358

[78](#) Civil Rights

[78](#)III Federal Remedies in General  
[78k1353](#) Liability of Public Officials  
[78k1358](#) k. Criminal law enforcement; prisons. [Most Cited Cases](#)

Sheriff was not liable under [§ 1983](#) for alleged deliberate indifference to medical needs of inmate related to inmate's end stage renal disease or chronic shoulder pain; there was no showing that sheriff was personally involved in denying medical treatment to inmate, or that there was a custom or policy at prison of allowing alleged constitutional violations. [U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.](#)

[\[22\] Federal Civil Procedure 170A](#)  2491.5

[170A](#) Federal Civil Procedure

[170A](#)XVII Judgment  
[170A](#)XVII(C) Summary Judgment  
[170A](#)XVII(C)2 Particular Cases  
[170A](#)k2491.5 k. Civil rights cases in general. [Most Cited Cases](#)

Genuine issue of material fact as to whether registered nurse on prison medical staff was personally involved in prison's alleged failure to arrange for inmate's kidney transplant test precluded summary judgment in inmate's [§ 1983](#) action alleging officials' deliberate indifference to his medical needs, in violation of Eighth Amendment. [U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.](#)

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**[23] Civil Rights 78**  **1358**

**78 Civil Rights**

**78III Federal Remedies in General**

**78k1353 Liability of Public Officials**

**78k1358 k. Criminal law enforcement; prisons.**

**Most Cited Cases**

If prison doctor denies medical treatment to an inmate, that doctor is “personally involved” in alleged constitutional violation for purposes of [§ 1983](#) liability. [U.S.C.A. Const.Amend. 8](#); [42 U.S.C.A. § 1983](#).

**[24] Federal Civil Procedure 170A**  **2491.5**

**170A Federal Civil Procedure**

**170AXVII Judgment**

**170AXVII(C) Summary Judgment**

**170AXVII(C)2 Particular Cases**

**170Ak2491.5 k. Civil rights cases in general.** [Most Cited Cases](#)

Genuine issue of material fact as to whether doctor denied medical treatment to inmate suffering from end stage renal disease, precluded summary judgment in inmate's [§ 1983](#) action alleging prison officials' deliberate indifference to his medical needs, in violation of Eighth Amendment. [U.S.C.A. Const.Amend. 8](#); [42 U.S.C.A. § 1983](#).

\*347 Anthony Price, pro se.

Edward J. Troy, Law Office of Edward J. Troy, Greenlawn, NY, for the Defendants.

**\*348 MEMORANDUM AND ORDER**

JOSEPH F. BIANCO, District Judge:

*Pro se* plaintiff Anthony Price (hereinafter “Price” or “plaintiff”) alleges, pursuant to [42 U.S.C. § 1983](#), that Sheriff Edward Reilly, Kim Edwards, RN, Perry Intal, Mary Sullivan, RN, Dr. Benjamin Okonta, and Nassau University Medical Center (hereinafter “defendants”) violated his Eighth Amendment rights by acting with deliberate indifference to his serious medical needs while plaintiff was incarcerated at the Nassau County

Correctional Center (hereinafter “NCCC”). Specifically, plaintiff alleges that defendants: (1) prescribed an incorrect dosage of medication for his [renal disease](#); (2) failed to get him tested for a [kidney transplant](#) list; and (3) failed to adequately treat him for shoulder pain. Defendants have moved for summary judgment on all of plaintiffs' claims. For the reasons set forth below, defendants' motion is granted in part and denied in part. Specifically, defendants' motion is granted with respect to plaintiff's claim regarding the dosage of his prescription medication and with respect to all of plaintiff's claims against Sheriff Reilly. Defendants' motion is denied in all other respects.

**I. FACTS**

[\[1\]](#)[\[2\]](#)[\[3\]](#) The Court has taken the facts set forth below from the parties' depositions, affidavits, and exhibits, and from the defendants' [Rule 56.1](#) statement of facts. [FN1](#) They are not findings of fact by the Court, but rather are assumed to be true for the purposes of deciding this motion. Upon consideration of a motion for summary judgment, the Court shall construe the facts in the light most favorable to the non-moving party—here, the plaintiff. See [Capobianco v. City of New York](#), 422 F.3d 47, 50 n. 1 (2d Cir.2005). Unless otherwise noted, where a party's 56.1 statement or deposition is cited, that fact is undisputed or the opposing party has pointed to no evidence in the record to contradict it.

[FN1](#). The Court notes that plaintiff failed to file and serve a response to defendants' Local [Rule 56.1](#) Statement of Facts in violation of [Local Civil Rule 56.1](#). Generally, a “plaintiff[s] failure to respond or contest the facts set forth by the defendants in their Rule 56.1 statement as being undisputed constitutes an admission of those facts, and those facts are accepted as being undisputed.” [Jessamy v. City of New Rochelle](#), 292 F.Supp.2d 498, 504 (S.D.N.Y.2003) (quoting [NAS Elecs., Inc. v. Transtech Elecs. PTE Ltd.](#), 262 F.Supp.2d 134, 139 (S.D.N.Y.2003)). However, “[a] district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules.” [Holtz v. Rockefeller & Co.](#), 258 F.3d 62, 73 (2d Cir.2001) (citations omitted); see

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also *Giliani v. GNOC Corp.*, No. 04 Civ. 2935(ILG), 2006 WL 1120602, at \*2 (E.D.N.Y. Apr. 26, 2006) (exercising court's discretion to overlook the parties' failure to submit statements pursuant to Local Civil Rule 56.1). In his opposition papers, plaintiff identifies defendants' arguments and factual assertions with which he disagrees. In the exercise of its broad discretion, and given plaintiff's *pro se* status, the Court will deem admitted only those facts in defendants' Rule 56.1 statement that are supported by admissible evidence and not controverted by other admissible evidence in the record. *See Jessamy*, 292 F.Supp.2d at 504-05. Furthermore, the Court has carefully reviewed all of the parties' submissions, including plaintiff's deposition, to determine if plaintiff has any evidence to support his claims.

#### A. Arrival at NCCC and Medication

Plaintiff was incarcerated in the Nassau County Correctional Center from January 7, 2007 to December 11, 2007. (Price Dep. at 6, 35.) Plaintiff has end stage renal disease and has been on dialysis since 2004 related to kidney failure. (*Id.* at 10; Defs.' 56.1 ¶ 2.) Plaintiff takes two daily medications, Renagel and PhosLo, for this condition. (Price Dep. at 10.) Before arriving\*<sup>349</sup> at the NCCC, <sup>FN2</sup> plaintiff was taking two 800 milligram pills of Renagel three times a day and two 667 milligram pills of PhosLo three times a day. (*Id.* at 12-13.)

<sup>FN2.</sup> Plaintiff was incarcerated at the Elmira correctional facility in 2005 and 2006. (Price Dep. at 7-8.)

When plaintiff arrived at the NCCC, he was interviewed by Perry Intal, a nurse practitioner in the medical intake department. (*Id.* at 21-22.) Plaintiff told Intal about his medical history, including that he was a dialysis patient and that he took medications. (*Id.* at 22.) Plaintiff was given a prescription for one 800 milligram pill of Renagel two times a day and one 667 milligram pill of PhosLo two times a day. (*Id.* at 23-24.) Two or three weeks later, plaintiff went to dialysis treatment and a blood test revealed high phosphorous levels. (*Id.* at 25-26.) As a

result, plaintiff was given an increased dosage of medication. (*Id.* at 25-27.) Thereafter, plaintiff's phosphorous levels decreased and about one month later (*id.* at 30-31), his dosage was decreased to one 800 milligram pill of Renagel three times a day and two 667 milligram pills of PhosLo three times a day. (*Id.* at 31-33.) This was the dosage plaintiff received for the rest of his incarceration at the NCCC. <sup>FN3</sup> (*Id.* at 32-33.) Plaintiff believed that the dosage he was receiving was "wrong" and that it was "hurting" him. (*Id.* at 59-60.) However, the more plaintiff complained about the dosage hurting him, "the more it seemed like the people got aggravated." (*Id.* at 60.) In addition, plaintiff's prescriptions for Renagel and PhosLo indicate that the medications were to be taken with meals. (*See* Defs.' Ex. E.) Plaintiff alleges, however, that the medications were sometimes given to him without food or at times that interfered with his meals. (Price Dep. at 23, 60.)

<sup>FN3.</sup> Plaintiff testified that, at the time of his deposition, he was receiving two 800 milligram pills of Renagel three times a day and two 667 milligram pills of PhosLo three times a day at the Fishkill correctional facility. (Price Dep. at 11-12.)

Besides receiving medication, plaintiff also received dialysis treatment three times a week at the Nassau University Medical Center. (*Id.* at 30.) On some occasions, plaintiff refused dialysis treatment because he "was feeling good" and "wanted to take a break" from treatment. (*Id.* at 56.) Plaintiff's regular medical treatment at the hospital also included a blood test every 30 days. (*Id.* at 27-28, 30.)

#### B. Kidney Transplant Request

In February or March 2007, plaintiff spoke with a social worker named "Susan" about getting tested for a kidney transplant. (*Id.* at 76.) A test was required before an inmate could be placed on a waiting list for kidney transplants. (*Id.* at 80-81.) Only two hospitals in the area dealt with such matters: Stony Brook and a hospital in Westchester County. (*Id.* at 75-76.) Susan tried to contact Dr. Benjamin Okonta (hereinafter "Okonta") at Nassau University Medical Center in or about February or March

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2007 (*id.* at 76-77), but Susan told plaintiff that Okonta did not get back to her.<sup>FN4</sup> (*Id.* at 65-66, 74-78.) Susan also submitted a letter to Okonta in July 2007, stating: “As per our conversation on 7/27/07, I am re-submitting for your review my request [for] your medical services on behalf of our renal dialysis pt., Anthony Price.” (*Id.* at 77-78; Defs.’ Ex. K.) Plaintiff never received a response from Okonta. (Price Dep. at 82.)

FN4. Plaintiff never interacted with Okonta except through Susan, the social worker. (Price Dep. at 73-74.)

Susan also submitted a letter to Nurse Mary Sullivan (hereinafter “Sullivan”), the \*350 day supervisor at the NCCC medical center, stating: “As per our telephone conversation, I am submitting in writing Anthony Price's request for referral and evaluation to a kidney transplant center ... Stonybrook Univ. Medical Ctr.” (Def.'s Ex. K.) At some point in time, plaintiff was called down to the NCCC medical center and was told by Sullivan that defendants knew about plaintiff's request to get on the kidney transplant list but that they had “other priorities right now.” (Price Dep. at 70.) Plaintiff believed Sullivan was referring to his other health issues. (*Id.* at 70.) Plaintiff did not ask when he would be tested for the kidney transplant list. (*Id.* at 71.)

On September 25, 2007, plaintiff filed a formal grievance regarding his request to be tested for the kidney transplant list.<sup>FN5</sup> (*Id.* at 85.) Plaintiff stated on his grievance form that he had “been waiting to take the test I need to take to get on the kidney transplant list” and that his social worker had told him that she had forwarded the paperwork to the jail, but could not get a response. (Defs.' Ex. F.) Plaintiff requested that he be “given the test to see if I'm a candidate for possibly a kidney transplant.” (*Id.*) By interdepartmental memorandum dated September 27, 2007, the Inmate Grievance Coordinator informed plaintiff that the medical grievance “is being discussed with and turned over to the Health Services Administrator. The medical unit will evaluate you. A Grievance Unit Investigator will contact you at a later date to conduct an evaluation of your status and to closeout the paperwork.” (*Id.*) In another memo dated October 5, 2007, defendant Kim Edwards,<sup>FN6</sup> informed plaintiff:

FN5. This was the only formal medical grievance filed by plaintiff. (Price Dep. at 85.)

FN6. Edwards never wrote medical orders for plaintiff or examined plaintiff. (Price Dep. at 61.) Plaintiff had no interaction with Edwards except her written response to plaintiff's grievance. (*Id.* at 67.)

The social worker can only inform you of treatment options that are available for your medical problem. If you are in need of a “test”, documentation must be provided by the attending physician that is responsible for your renal treatment.

(*Id.*) Plaintiff interpreted this response from Edwards to mean that the matter was now in the hands of the medical department, and so he did not further proceed with the grievance and “did not feel it was necessary.” (Pl.'s Opp. at 3.) FN7 Therefore, plaintiff “signed off on the grievance,” saying that he had “read it and accepted it.” (Price Dep. at 88.)

FN7. Although plaintiff does not offer this explanation in his deposition, the Court construes the *pro se* plaintiff's sworn “verified rebuttal” to defendants' motion for summary judgment as an evidentiary submission. See *Patterson v. County of Oneida*, 375 F.3d 206, 219 (2d Cir.2004) (“[A] verified pleading, to the extent that it makes allegations on the basis of the plaintiff's personal knowledge, and not merely on information and belief, has the effect of an affidavit and may be relied on to oppose summary judgment.”); see also *Hailey v. N.Y. City Transit Auth.*, 136 Fed.Appx. 406, 407-08 (2d Cir.2005) (“The rule favoring liberal construction of *pro se* submissions is especially applicable to civil rights claims.”).

Plaintiff did not get the requested test during the remainder of his incarceration at the NCCC. (*Id.* at 90.) Defendants have submitted evidence that they made efforts to get plaintiff tested and, in fact, scheduled plaintiff for a test at Stony Brook University Hospital on November 29, 2007, but that the test had to be cancelled due to “unforeseen circumstances”; the test was

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re-scheduled for January 10, 2008. (Defs.' Ex. G, Reschke Aff. ¶¶ 6-7.) Plaintiff was not informed about any scheduled test (Pl.'s Opp. at 2), and he was \*351 transferred to a different facility in December 2007. (Price Dep. at 35; Reschke Aff. ¶ 7.)

### C. Shoulder Pain

Plaintiff began complaining about shoulder pain to the medical department at the NCCC on January 17, 2007, stating that his right shoulder was "extremely hurting." (Price Dep. at 36; Defs.' Ex. E, Sick Call Request, Jan. 17, 2007.) Plaintiff had received treatment for shoulder pain in the past, including a shot of Cortisone while at the Elmira facility (Price Dep. at 38, 53-54; Defs.' Ex. E, Sick Call Request, Apr. 14, 2007.) After the January 17 complaint, plaintiff was seen a couple of days later and given medication to rub on his shoulder. (Price Dep. at 41.) The medication did not help with the discomfort, and so plaintiff complained again later in January. (*Id.* at 42-43.) Although defendants gave plaintiff Motrin and Naprosyn for the pain, no x-rays were taken for several months. (*Id.* at 44, 55; Defs.' Ex. H, Edwards Aff. ¶ 4.) The pain medication continued to be ineffective, and plaintiff continued to complain. (*See, e.g., id.* at 45, 51.) For instance, in June 2007, plaintiff complained that his right shoulder "hurts really bad." (Def.'s Ex. E, Sick Call Request, June 12, 2007.) Plaintiff never refused medication for his shoulder. (Price Dep. at 56.) When plaintiff eventually was given x-rays, in April and November 2007 (Edwards Aff. ¶ 4), plaintiff was told that nothing was wrong with his shoulder.<sup>FN8</sup> (Price Dep. at 44; *see also* Defs.' Ex. J, Discharge Summary, November 2007 ("Although no definite evidence of venous thrombosis is seen with Rt. upper extremity, short segment acute thrombosis cannot be reliably excluded, Ultrasound might provide additional information....").) Plaintiff states that, with respect to his right shoulder, he currently wears a brace for carpal tunnel syndrome, has a separated shoulder, and takes shots for the pain. (Pl.'s Opp. at 4.)

<sup>FN8.</sup> Plaintiff testified that he stopped complaining about his shoulder at some point because he was frustrated that defendants were not helping. (Price Dep. at 54-55.) There is evidence that plaintiff complained about his shoulder at least as late as June 2007, and again

complained in November 2007, which resulted in the taking of additional x-rays. (*See* Def.'s Ex. E, Sick Call Request, June 21, 2007; Defs.' Ex. J.)

## II. PROCEDURAL HISTORY

On June 28, 2007, plaintiff filed the initial complaint in this action. Plaintiff filed an amended complaint on August 20, 2007 alleging, pursuant to Section 1983, that defendants Sheriff Edward Reilly, Kim Edwards, Perry Intal, and Nassau University Medical Center violated his Eighth Amendment rights with respect to his medication dosage, kidney transplant request, and shoulder pain. On November 14, 2007, plaintiff filed another complaint in a separate action (No. 07-CV-4841) making substantially the same allegations and expanding on his allegations regarding the kidney transplant request. This complaint named Mary Sullivan and Dr. Benjamin Okonta, as well as the Nassau University Medical Center, as defendants. By Order dated July 11, 2008, the Court consolidated both actions (Nos. 07-CV2634 and 07-CV-4841) because the allegations in the two actions were "factually intertwined."

Defendants moved for summary judgment on May 29, 2009.<sup>FN9</sup> Plaintiff submitted\*352 an opposition to the motion on August 3 and August 11, 2009. <sup>FN10</sup> Defendants replied on August 20, 2009. Plaintiff submitted a surreply on October 6, 2009. This matter is fully submitted.

<sup>FN9.</sup> Pursuant to Local Rule 56.1, defendants also served plaintiff with the requisite notice for *pro se* litigants opposing summary judgment motions. *See Irby v. N.Y. City Transit Auth.*, 262 F.3d 412, 414 (2d Cir.2001) ("And we remind the district courts of this circuit, as well as summary judgment movants, of the necessity that *pro se* litigants have actual notice, provided in an accessible manner, of the consequences of the *pro se* litigant's failure to comply with the requirements of Rule 56.").

<sup>FN10.</sup> Plaintiff submitted his two identical oppositions and a sur-reply to the instant motion not only in this action, but also in the now-consolidated action (No. 07-CV-4841). The

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Court has considered all of plaintiff's submissions in both actions in deciding the instant motion.

### III. STANDARD OF REVIEW

The standards for summary judgment are well settled. Pursuant to [Federal Rule of Civil Procedure 56\(c\)](#), summary judgment is appropriate only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." [Fed.R.Civ.P. 56\(c\); Reiseck v. Universal Commc'n's of Miami, Inc.](#), 591 F.3d 101, 104 (2d Cir.2010). The moving party bears the burden of showing that he or she is entitled to summary judgment. *See Huminski v. Corsones*, 396 F.3d 53, 69 (2d Cir.2005). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." [Amnesty Am. v. Town of W. Hartford](#), 361 F.3d 113, 122 (2d Cir.2004); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (summary judgment is unwarranted if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

Once the moving party has met its burden, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts .... [T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*." [Caldarola v. Calabrese](#), 298 F.3d 156, 160 (2d Cir.2002) (quoting [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (emphasis in original)). As the Supreme Court stated in *Anderson*, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." [Anderson](#), 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted). Indeed, "the mere existence of *some* alleged factual dispute between the parties" alone will not defeat a properly supported motion for summary judgment. *Id.* at 247-48, 106 S.Ct. 2505 (emphasis in original). Thus, the nonmoving party may not rest upon mere conclusory allegations or denials but must set forth "concrete particulars" showing that a trial is needed.

[R.G. Group, Inc. v. Horn & Hardart Co.](#), 751 F.2d 69, 77 (2d Cir.1984) (quoting [SEC v. Research Automation Corp.](#), 585 F.2d 31, 33 (2d Cir.1978)). Accordingly, it is insufficient for a party opposing summary judgment "merely to assert a conclusion without supplying supporting arguments or facts." [BellSouth Telecomms., Inc. v. W.R. Grace & Co.](#), 77 F.3d 603, 615 (2d Cir.1996) (quoting [Research Automation Corp.](#), 585 F.2d at 33).

[4][5] Where the plaintiff is proceeding *pro se*, the Court must "construe [the complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggest[s]." [Weixel v. Bd. of Educ. of the City of N.Y.](#), 287 F.3d 138, 145-46 (2d Cir.2002) (alterations in original) (quoting [Cruz v. Gomez](#), 202 F.3d 593, 597 (2d Cir.2000)). Though a *pro se* litigant's pleadings and other submissions are afforded wide latitude, a *pro se* party's conclusory assertions, completely unsupported \*353 by evidence, are not sufficient to defeat a motion for summary judgment. [Shah v. Kuwait Airways Corp.](#), 653 F.Supp.2d 499, 502 (S.D.N.Y.2009) ("Even a *pro se* party, however, 'may not rely simply on conclusory allegations or speculation to avoid summary judgment, but instead must offer evidence to show that its version of the events is not wholly fanciful.' " (quoting [Auguste v. N.Y. Presbyterian Med. Ctr.](#), 593 F.Supp.2d 659, 663 (S.D.N.Y.2009))).

### IV. DISCUSSION

[6] To prevail on a claim under [Section 1983](#), a plaintiff must show: (1) the deprivation of any rights, privileges, or immunities secured by the Constitution and its laws; (2) by a person acting under the color of state law. [42 U.S.C. § 1983](#). "[Section 1983](#) itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere." [Sykes v. James](#), 13 F.3d 515, 519 (2d Cir.1993).

There is no dispute for purposes of this motion that defendants were acting under color of state law. The question presented, therefore, is whether defendants' alleged conduct deprived plaintiff of his Eighth Amendment rights. Plaintiff alleges that his Eighth Amendment rights were violated when defendants: (1) prescribed him an incorrect dosage of medication for his [renal disease](#); (2) failed to get him tested for the [kidney](#)

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[transplant](#) list; and (3) failed to adequately treat him for his shoulder pain. For the reasons set forth below, after drawing all reasonable inferences from the facts in favor of plaintiff, the Court concludes that defendants are entitled to summary judgment on plaintiff's claim regarding the dosage of his medication and on all of plaintiff's claims against Sheriff Reilly. Defendants' motion for summary judgment is denied in all other respects.

#### A. Exhaustion

As a threshold matter, defendants argue that plaintiff is barred from raising any Eighth Amendment claim with respect to his [kidney transplant](#) request because plaintiff has not exhausted his administrative remedies.[FN11](#) For the reasons set forth below, the Court disagrees and cannot conclude from this record that plaintiff failed to exhaust his administrative remedies.

[FN11](#). Defendants raise exhaustion only with respect to plaintiff's kidney transplant request, and so the Court does not consider exhaustion with respect to plaintiff's other claims.

##### 1. Legal Standard

The Prison Litigation Reform Act of 1995 ("PLRA") states that "[n]o action shall be brought with respect to prison conditions under [\[42 U.S.C. § 1983\]](#), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." [42 U.S.C. § 1997e\(a\)](#). "The PLRA exhaustion requirement 'applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.' Prisoners must utilize the state's grievance procedures, regardless of whether the relief sought is offered through those procedures." [Espinail v. Goord](#), 558 F.3d 119, 124 (2d Cir.2009) (quoting [Porter v. Nussle](#), 534 U.S. 516, 532, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002)). "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules." [Woodford v. Ngo](#), 548 U.S. 81, 90, 126 S.Ct. 2378, 165 L.Ed.2d 368

[\(2006\)](#). Therefore, the exhaustion inquiry requires a court to "look at the state prison procedures and the prisoner's grievance to determine whether the prisoner has complied with those procedures." \*354 [Espinail](#), 558 F.3d at 124 (citing [Jones v. Bock](#), 549 U.S. 199, 218, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007) and [Woodford](#), 548 U.S. at 88-90, 126 S.Ct. 2378).

Prior to [Woodford](#), 548 U.S. 81, 126 S.Ct. 2378 (2006), the Second Circuit "recognized some nuances in the exhaustion requirement: (1) administrative remedies that are ostensibly 'available' may be unavailable as a practical matter, for instance, if the inmate has already obtained a favorable result in administrative proceedings but has no means of enforcing that result; (2) similarly, if prison officials inhibit the inmate's ability to seek administrative review, that behavior may equitably estop them from raising an exhaustion defense; (3) imperfect exhaustion may be justified in special circumstances, for instance if the inmate complied with his reasonable interpretation of unclear administrative regulations, or if the inmate reasonably believed he could raise a grievance in disciplinary proceedings and gave prison officials sufficient information to investigate the grievance." [Reynoso v. Swezey](#), 238 Fed.Appx. 660, 662 (2d Cir.2007) (internal citations omitted); *see also* [Davis v. New York](#), 311 Fed.Appx. 397, 399 (2d Cir.2009) (citing [Hemphill v. New York](#), 380 F.3d 680, 686, 691 (2d Cir.2004)). However, the Second Circuit has not decided whether the above-discussed considerations apply post- [Woodford](#). *See, e.g.*, [Reynoso](#), 238 Fed.Appx. at 662 ("Because we agree with the district court that [plaintiff] cannot prevail on any of these grounds, we have no occasion to decide whether [Woodford](#) has bearing on them."); [Ruggiero v. County of Orange](#), 467 F.3d 170, 176 (2d Cir.2006) ("We need not determine what effect [Woodford](#) has on our case law in this area, however, because [plaintiff] could not have prevailed even under our pre- [Woodford](#) case law.").

As the Supreme Court has held, exhaustion is an affirmative defense: "We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints." [Jones v. Bock](#), 549 U.S. 199, 216, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007); *see also* [Key v. Toussaint](#), 660 F.Supp.2d 518, 523 (S.D.N.Y.2009) ("Failure to exhaust remedies under the PLRA is an affirmative defense, and thus the defendants have the

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burden of proving that [plaintiff's] retaliation claim has not been exhausted." (citations omitted)).

## 2. Application

Defendants argue that plaintiff did not appeal the resolution of his grievance request, i.e., the memo from Edwards dated October 5, 2007, stating that: "If you are in need of a 'test', documentation must be provided by the attending physician that is responsible for your renal treatment." (Defs.' Ex. F.) Therefore, defendants argue, plaintiff has failed to exhaust his administrative remedies under the PLRA. (Defs.' Br. at 25.) Plaintiff argues in response that he did not believe any further action on his grievance was "necessary" because the matter was put into the hands of the medical department. (Pl.'s Opp. at 3.) For the reasons discussed below, the Court concludes that, on this record, defendants have not met their burden of proving that plaintiff failed to exhaust his administrative remedies.

[7][8][9] As discussed above, the PLRA requires exhaustion only with respect to "such administrative remedies as are available." See [42 U.S.C. § 1997e\(a\)](#). Therefore, in order to determine whether plaintiff exhausted his administrative remedies, the Court "must first establish from a legally sufficient source that an administrative remedy is applicable and that the particular complaint does not fall within an exception. Courts should be careful to look at the applicable set of grievance procedures,\*355 whether city, state or federal." [Mojias v. Johnson](#), [351 F.3d 606, 610 \(2d Cir.2003\)](#); see also [Espinal](#), [558 F.3d at 124](#) (holding that, when considering exhaustion, courts must "look at the state prison procedures and the prisoner's grievance to determine whether the prisoner has complied with those procedures" (citations omitted)). "Whether an administrative remedy was available to a prisoner in a particular prison or prison system, and whether such remedy was applicable to the grievance underlying the prisoner's suit, are not questions of fact. They are, or inevitably contain, questions of law." See [Snider v. Melindez](#), [199 F.3d 108, 113-14 \(2d Cir.1999\)](#). However, "the existence of the procedure may be a matter of fact." [Id. at 114](#).

On the record before the Court on this motion, the Court

is unable to establish from any legally sufficient source that an administrative remedy was available to plaintiff. Defendants have made no submissions to the Court regarding the applicable grievance procedures at the NCCC. See, e.g., [Abney v. County of Nassau](#), [237 F.Supp.2d 278, 281 \(E.D.N.Y.2002\)](#) (noting that the "Inmate Handbook" for the Nassau County Correctional Facility procedure was "annexed to Defendants' moving papers"). Specifically, defendants have not submitted any evidence, by affidavit or otherwise, that NCCC procedures offer a remedy to address the particular situation in this case.[FN12](#) Therefore, the Court cannot conclude from this record that plaintiff had an available administrative remedy that he failed to exhaust.

[FN12](#). The Court notes that the October 5, 2007 memo from Edwards is unclear as to which party bore the responsibility of obtaining plaintiff's medical records. (Defs.' Ex. F.) Edwards explains in an affidavit that she advised plaintiff that "it would be necessary for his doctors to provide the selected facility with his records before a request for testing would be considered." (Edwards Aff. ¶ 2.) It is unclear whether plaintiff had access to these records or whether the prison would need to obtain them. Thus, there appears to be a factual question as to the implementation of this grievance resolution. A similar situation arose in [Abney v. McGinnis](#), [380 F.3d 663 \(2d Cir.2004\)](#), in which the Second Circuit held that where a prisoner achieved favorable results in several grievance proceedings but alleged that prison officials failed to implement those decisions, that prisoner was without an administrative remedy and therefore had exhausted his claim for purposes of the PLRA. See [id. at 667-68, 669](#) ("Where, as here, prison regulations do not provide a viable mechanism for appealing implementation failures, prisoners in [plaintiff's] situation have fully exhausted their available remedies."). The Court recognizes that [Abney](#), [380 F.3d 663](#), was decided before [Woodford v. Ngo](#), [548 U.S. 81, 126 S.Ct. 2378, 165 L.Ed.2d 368 \(2006\)](#), and that, as discussed above, the Second Circuit has not decided whether the various nuances to the exhaustion requirement apply post- [Woodford](#). However, the Court need not decide the applicability of any such nuances to the

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exhaustion requirement because, as discussed above, defendants have failed to establish the procedural framework for grievance resolution at the NCCC and the availability of *any* administrative remedies.

Although there may be administrative remedies for such a situation under the New York Department of Corrections regulations, *see 7 N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5(c)(4)* ("If a decision is not implemented within 45 days, the grievant may appeal to CORC citing lack of implementation as a mitigating circumstance."), it does not follow that the same procedure applies at the NCCC. *See, e.g., Abney v. County of Nassau, 237 F.Supp.2d at 283* ("The flaw in Defendants' argument, however, is that the cases relied upon were all decided under the New York State administrative procedure-none were decided in the context of the procedure relied upon-the Nassau County Inmate Handbook procedure.").

#### B. Plaintiff's Claims of Deliberate Indifference

##### 1. Legal Standard

"[D]eliberate indifference to serious medical needs of prisoners constitutes the \*356 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment" and therefore "states a cause of action under [§ 1983](#)." *Estelle v. Gamble, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)*. As the Second Circuit has explained,

[t]he Eighth Amendment requires prison officials to take reasonable measures to guarantee the safety of inmates in their custody. Moreover, under [42 U.S.C. § 1983](#), prison officials are liable for harm incurred by an inmate if the officials acted with "deliberate indifference" to the safety of the inmate. However, to state a cognizable [section 1983](#) claim, the prisoner must allege actions or omissions sufficient to demonstrate deliberate indifference; mere negligence will not suffice.

*Hayes v. N.Y. City Dep't of Corr., 84 F.3d 614, 620 (2d Cir.1996)* (citations omitted). Within this framework, "[d]eliberate indifference to a prisoner's serious medical needs constitutes cruel and unusual punishment, in violation of the Eighth Amendment, as made applicable to the states through the Fourteenth Amendment." *Bellotto v. County of Orange, 248 Fed.Appx. 232, 236 (2d Cir.2007)*.

Thus, according to the Second Circuit,

[d]efendants may be held liable under [§ 1983](#) if they ... exhibited deliberate indifference to a known injury, a known risk, or a specific duty, and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff's deprivation of rights under the Constitution. Deliberate indifference is found in the Eighth Amendment context when a prison supervisor knows of and disregards an excessive risk to inmate health or safety .... Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause.

*Ortiz v. Goord, 276 Fed.Appx. 97, 98 (2d Cir.2008)* (citations and quotation marks omitted); *see also Harrison v. Barkley, 219 F.3d 132, 137 (2d Cir.2000)* ("Deliberate indifference will exist when an official 'knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.'") (quoting *Farmer v. Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)*); *Curry v. Kerik, 163 F.Supp.2d 232, 237 (S.D.N.Y.2001)* ("'[A]n official acts with the requisite deliberate indifference when that official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'") (quoting *Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir.1998)* (internal quotation marks omitted)).

[\[10\]](#)[\[11\]](#) In particular, the Second Circuit has set forth a two-part test for determining whether a prison official's actions or omissions rise to the level of deliberate indifference:

The test for deliberate indifference is twofold. First, the plaintiff must demonstrate that he is incarcerated under conditions posing a substantial risk of serious harm.

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Second, the plaintiff must demonstrate that the defendant prison officials possessed sufficient culpable intent. The second prong of the deliberate indifference test, culpable intent, in turn, involves a two-tier inquiry. Specifically, a prison official has sufficient culpable intent if he has knowledge that an inmate faces a substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate the harm.

\*357 *Hayes*, 84 F.3d at 620 (internal citation omitted); see also *Phelps v. Kapnolas*, 308 F.3d 180, 185-86 (2d Cir.2002) (setting forth two-part deliberate indifference test).

In *Salahuddin v. Goord*, the Second Circuit set forth in detail the objective and subjective elements of a medical indifference claim. 467 F.3d 263 (2d Cir.2006). In particular, with respect to the first, objective element, the Second Circuit explained:

The first requirement is objective: the alleged deprivation of adequate medical care must be sufficiently serious. Only deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation. Determining whether a deprivation is an objectively serious deprivation entails two inquiries. The first inquiry is whether the prisoner was actually deprived of adequate medical care. As the Supreme Court has noted, the prison official's duty is only to provide reasonable care. Thus, prison officials who act reasonably [in response to an inmate-health risk] cannot be found liable under the Cruel and Unusual Punishments Clause, and, conversely, failing to take reasonable measures in response to a medical condition can lead to liability.

Second, the objective test asks whether the inadequacy in medical care is sufficiently serious. This inquiry requires the court to examine how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner. For example, if the unreasonable medical care is a failure to provide any treatment for an inmate's medical condition, courts examine whether the inmate's medical condition is

sufficiently serious. Factors relevant to the seriousness of a medical condition include whether a reasonable doctor or patient would find [it] important and worthy of comment, whether the condition significantly affects an individual's daily activities, and whether it causes chronic and substantial pain. In cases where the inadequacy is in the medical treatment given, the seriousness inquiry is narrower. For example, if the prisoner is receiving on-going treatment and the offending conduct is an unreasonable delay or interruption in that treatment, the seriousness inquiry focus[es] on the challenged delay or interruption in treatment rather than the prisoner's underlying medical condition alone. Thus, although we sometimes speak of a serious medical condition as the basis for an Eighth Amendment claim, such a condition is only one factor in determining whether a deprivation of adequate medical care is sufficiently grave to establish constitutional liability.

467 F.3d at 279-80 (citations and quotation marks omitted); see also *Jones v. Westchester County Dep't of Corr. Medical Dep't*, 557 F.Supp.2d 408, 413-14 (S.D.N.Y.2008).

With respect to the second, subjective component, the Second Circuit further explained:

The second requirement for an Eighth Amendment violation is subjective: the charged official must act with a sufficiently culpable state of mind. In medical-treatment cases not arising from emergency situations, the official's state of mind need not reach the level of knowing and purposeful infliction of harm; it suffices if the plaintiff proves that the official acted with deliberate indifference to inmate health. Deliberate indifference is a mental state equivalent to subjective recklessness, as the term is used in criminal law. This mental state requires that the charged official act or fail to act while actually aware \*358 of a substantial risk that serious inmate harm will result. Although less blameworthy than harmful action taken intentionally and knowingly, action taken with reckless indifference is no less actionable. The reckless official need not desire to cause such harm or be aware that such harm will surely or almost certainly result. Rather, proof of awareness of a substantial risk of the harm suffices. But recklessness

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entails more than mere negligence; the risk of harm must be substantial and the official's actions more than merely negligent.

Salahuddin, 467 F.3d at 280 (citations and quotation marks omitted); *see also Jones*, 557 F.Supp.2d at 414. The Supreme Court has stressed that

in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Estelle v. Gamble, 429 U.S. 97, 105-06, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (internal citations omitted); *see also Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir.2003) ("A showing of medical malpractice is therefore insufficient to support an Eighth Amendment claim unless the malpractice involves culpable recklessness, i.e., an act or a failure to act by the prison doctor that evinces a conscious disregard of a substantial risk of serious harm." (internal quotations omitted)); Harrison v. Barkley, 219 F.3d 132, 139 (2d Cir.2000) (a medical practitioner who "delay[s] ... treatment based on a bad diagnosis or erroneous calculus of risks and costs" does not evince the culpability necessary for deliberate indifference).

## 2. Application

Plaintiff alleges that defendants violated his Eighth Amendment rights by: (1) prescribing an incorrect dosage of his renal disease medication; (2) failing to have him tested for the kidney transplant list; and (3) failing to properly treat his shoulder pain. The Court considers each claim in turn and, for the reasons discussed below, concludes that defendants are entitled to summary

judgment on plaintiff's claim regarding his medication dosage and on all of plaintiff's claims against Sheriff Reilly. Defendants' motion is denied in all other respects.

### a. Medication Dosage

Defendants concede that plaintiff's kidney condition is serious (Defs.' Br. at 21), but argue that the dosage of Renagel and PhosLo prescribed for plaintiff did not result in any injury. Defendants also argue that, even if the dosage was incorrect, it was at most "an error in medical judgment." Finally, defendants argue that plaintiff cannot show deliberate indifference because defendants continually tested plaintiff and twice changed the dosage of his medication depending on his phosphorous levels. (Defs.' Br. at 22.) For the reasons set forth below, the Court agrees and concludes that no rational jury could find that defendants acted with deliberate indifference with respect to the prescription\*359 of medication for plaintiff's renal disease.

### i. Objective Prong

[12][13][14] Plaintiff has failed to present any evidence that the allegedly incorrect medication dosage posed an objectively serious risk to plaintiff's health. As a threshold matter, the mere fact that plaintiff's underlying renal disease is a serious medical condition does not mean that the allegedly incorrect treatment for that condition poses an objectively serious health risk. *See Smith v. Carpenter*, 316 F.3d 178, 186-87 (2d Cir.2003) ("As we noted in Chance [v. Armstrong, 143 F.3d 698 (2d Cir.1998) ], it's the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract, that is relevant for Eighth Amendment purposes."). Furthermore, plaintiff has failed to produce any evidence that his medication dosage at the NCCC caused him any objectively serious harm. Instead, plaintiff testified merely that the prescribed dosage was "wrong" and was "hurting" him.FN13 (Price Dep. at 60.) Plaintiff's belief that the medication dosage was incorrect is insufficient to establish the objective prong of the deliberate indifference test.FN14 *See Fox v. Fischer*, 242 Fed.Appx. 759, 760 (2d Cir.2007) ("[T]he fact that [plaintiff] was provided Claritin as a substitute for Allegra

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fails to establish deliberate indifference to a serious medical need, because there is no allegation that the change in medication caused harm, if any, sufficiently serious to establish the objective prong of a deliberate indifference claim...."); *Reyes v. Gardener*, 93 Fed.Appx. 283, 285 (2d Cir.2004) ("[Plaintiff] has offered no evidence ... showing that the prescribed medication regimen deviated from reasonable medical practice for the treatment of his condition."). Although there is evidence that plaintiff's phosphorous levels increased when he was prescribed a lesser dosage of medication upon arriving at the NCCC (see Price Dep. \*360 at 23-26), that is not by itself enough to support a finding of an objectively serious condition.<sup>FN15</sup> See *Smith*, 316 F.3d at 188-89 ("Although [plaintiff] suffered from an admittedly serious underlying condition, he presented no evidence that the two alleged episodes of missed medication resulted in permanent or on-going harm to his health, nor did he present any evidence explaining why the absence of actual physical injury was not a relevant factor in assessing the severity of his medical need.") (affirming denial of motion for new trial). Thus, plaintiff's medication dosage claim must fail because he cannot show that the complained-of dosage posed an objectively serious health risk.<sup>FN16</sup>

<sup>FN13</sup>. Plaintiff does not distinguish between the initial dosage he received at the NCCC and the later dosages he received, instead arguing generally that all of the dosages he received at the NCCC were incorrect.

<sup>FN14</sup>. Plaintiff's conclusory testimony that the dosage was "hurting" him also is insufficient to establish the objective prong of the deliberate indifference test. To the extent plaintiff claims that the medication caused him pain, there is no evidence in the record that plaintiff suffered from chronic pain or, indeed, any other objectively serious symptoms in connection with the medication dosage. Although not mentioned in plaintiff's deposition or in his opposition to the instant motion, plaintiff alleges in his amended complaint that the lesser dosage put him at risk of "itching" and "breaking of bones." (Amended Complaint, No. 07-CV-2634, at 4.) There is evidence that plaintiff suffered from a rash and/or itching while at the NCCC and that plaintiff was told at one point that he had

eczema. (See Price Dep. at 45-51.) However, there is no evidence to connect those symptoms with the medication dosage for his renal disease. (See, e.g., *id.* at 46 ("Q. Did anyone ever tell you what was causing a rash? A. I kept going to the-I had went to the dermatologist at Bellevue. To me, the doctor had an attitude like it ain't nothing wrong; like it was acne or something.").) Furthermore, there is no evidence that the rash and/or itching was an objectively serious condition. See *Lewal v. Wiley*, 29 Fed.Appx. 26, 29 (2d Cir.2002) (affirming summary judgment and holding that plaintiff's alleged "persistent rash" was not a "serious medical condition"); see also *Benitez v. Ham*, No. 04-CV-1159, 2009 WL 3486379, at \*11 (N.D.N.Y. Oct. 21, 2009) ("[T]he evidence shows that Plaintiff suffered from a severe body itch. While this condition was undoubtedly unpleasant, it simply does not rise to the level of an Eighth Amendment violation."). In any event, even if plaintiff did suffer from an objectively serious condition because of the medication dosage, he cannot prove that defendants acted with a subjectively culpable state of mind, as discussed *infra*.

<sup>FN15</sup>. In any event, as discussed *infra*, defendants adjusted plaintiff's dosage in response to the increase in phosphorous levels, and there is no evidence from which a rational jury could conclude that defendants acted with deliberate indifference in prescribing plaintiff's medication.

<sup>FN16</sup>. Although he does not raise it in any of his pleadings or in his opposition to the instant motion, plaintiff testified at his deposition that he had to take the medication with meals but that sometimes he was given the medication without food or at times that interfered with his meals. (Price Dep. at 23, 60; Defs.' Ex. E.) The record is unclear as to how often this occurred. The Court assumes, as it must on this motion for summary judgment, that on some occasions plaintiff was given his medications not at meal times or at times that interfered with meals. However, plaintiff points to no evidence whatsoever of any harm caused by defendants' alleged conduct in this regard, and, therefore, no

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rational jury could find that the provision of medication without food on some occasions was objectively serious. *See Gillard v. Kuykendall*, 295 Fed.Appx. 102, 103 (8th Cir.2008) (affirming summary judgment for defendants where defendants, on some occasions, “were late in giving [plaintiff] his medications and did not always administer them with meals as [plaintiff] apparently desired” where there was no evidence of any adverse consequences). Thus, any deliberate indifference claim based on these allegations would fail as well.

#### ii. Subjective Prong

[15][16] Plaintiff's claim with respect to his medication dosage also fails because plaintiff cannot show that defendants acted with subjectively culpable intent, i.e., that they were aware of, and consciously disregarded, plaintiff's serious medical needs. Plaintiff's claim is based on his assertion that the prescribed dosage was “wrong.” However, mere disagreement with a prescribed medication dosage is insufficient as a matter of law to establish the subjective prong of deliberate indifference. *See Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir.1998) (“It is well-established that mere disagreement over the proper treatment does not create a constitutional claim. So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation.”); *Sonds v. St. Barnabas Hosp. Corr. Health Servs.*, 151 F.Supp.2d 303, 312 (S.D.N.Y.2001) (“[D]isagreements over medications ... are not adequate grounds for a Section 1983 claim. Those issues implicate medical judgments and, at worst, negligence amounting to medical malpractice, but not the Eighth Amendment.” (citing *Estelle*, 429 U.S. at 107, 97 S.Ct. 285); *see also*, e.g., *Fuller v. Ranney*, No. 06-CV-0033, 2010 WL 597952, at \*11 (W.D.N.Y. Feb. 17, 2010) (“Plaintiff's claim amounts to nothing more than a disagreement with the prescribed treatment he received and his insistence that he be prescribed certain medications. Without more, plaintiff's disagreement with the treatment he received does not rise to the level of a constitutional violation of his Eighth Amendment rights.”); *Covington v. Westchester County Dep't of Corr.*, No. 06 Civ. 5369, 2010 WL 572125, at \*6 (S.D.N.Y. Jan. 25, 2010) (“[Plaintiff's] claims that Defendants failed \*361 to change or increase his medication and counseling

sessions amount to negligence claims at most, which is insufficient.”); *Hamm v. Hatcher*, No. 05-CV-503, 2009 WL 1322357, at \*8 (S.D.N.Y. May 5, 2009) (“Plaintiff's unfulfilled demand for a larger dosage of [the medication] represents a mere disagreement over the course of Plaintiff's treatment and is inconsistent with deliberate indifference ....”).

The fact that defendants adjusted the dosage of plaintiff's medication in response to plaintiff's phosphorous levels (*see* Price Dep. at 25-27) is also inconsistent with deliberate indifference. *See Bellotto v. County of Orange*, 248 Fed.Appx. 232, 237 (2d Cir.2007) (“The record also shows that mental health professionals responded to [plaintiff's] concerns about his medications and adjusted his prescription as they believed necessary.”) (affirming summary judgment for defendants); *see also Jolly v. Knudsen*, 205 F.3d 1094, 1097 (8th Cir.2000) (“[Defendant's] actions in this case cannot reasonably be said to reflect deliberate indifference. The only relevant evidence in the record indicates that [defendant's] actions were aimed at correcting perceived difficulties in [plaintiff's] dosage levels [in response to blood tests.”); *Fuller*, 2010 WL 597952, at \*11 (“Moreover, a subsequent decision to prescribe plaintiff a certain medication does not indicate that the medication should have been prescribed earlier.”).<sup>FN17</sup> Thus, there is no evidence in the record sufficient for a rational jury to find that defendants acted with deliberate indifference regarding the prescription dosage of plaintiff's renal disease medication.

<sup>FN17</sup>. To the extent plaintiff also argues that that defendants acted with deliberate indifference because he has received different prescriptions at different facilities, the Court rejects that argument as well. *See*, e.g., *Cole v. Goord*, No. 04 Civ. 8906, 2009 WL 1181295, at \*8 n. 9 (S.D.N.Y. Apr. 30, 2009) (“[Plaintiff's] reliance upon the fact that subsequent medical providers have provided him with a different course of medication or treatment ... does nothing to establish that [defendant] violated [plaintiff's] Eighth Amendment rights. Physicians can and do differ as to their determination of the appropriate treatment for a particular patient; that difference in opinion does not satisfy the requirements for a constitutional claim of deliberate indifference.”

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(citing *Estelle*, 429 U.S. at 97, 97 S.Ct. 285)).

In sum, based on the undisputed facts and drawing all reasonable inferences in plaintiff's favor, no rational jury could find that defendants were aware of, and consciously disregarded, plaintiff's objectively serious health needs regarding his medication dosage. Accordingly, defendants' motion for summary judgment is granted with respect to this claim.

b. Kidney Transplant

[17] Defendants also argue that plaintiff cannot proceed with his deliberate indifference claim regarding his request to be tested for a kidney transplant. Defendants do not dispute the objective seriousness of plaintiff's underlying condition or the requested transplant, and instead argue only that defendants lacked subjective culpability. Specifically, defendants argue that they made reasonable efforts to get plaintiff tested. (Defs.' Br. at 23.) However, construing the facts in the light most favorable to plaintiff, a rational jury could find that defendants were aware of, and consciously disregarded, plaintiff's serious medical needs.

Plaintiff began requesting a kidney transplant test as early as February or March 2007 and still had not received one by the time he left the NCCC in December 2007. (See Price Dep. at 76-77, 90.) Requests were sent on plaintiff's behalf to Dr. Okonta at the Nassau University Medical Center and to Nurse Mary Sullivan at \*362 the NCCC medical department. (See Defs.' Ex. K.) The record indicates that plaintiff received no response from Okonta. (See Price Dep. at 82.) When plaintiff asked Sullivan about the test, Sullivan told him that defendants had "other priorities right now." (Price Dep. at 70.) Even after plaintiff filed a formal grievance in September 2007, he still did not receive the requested test. (See Defs.' Ex. F.) On these facts, where there was a delay of at least nine months in arranging a kidney transplant test for plaintiff despite plaintiff's repeated requests, and where defendants do not dispute the necessity of the test, a rational jury could find that defendants acted with deliberate indifference to plaintiff's serious medical needs. See *Harrison v. Barkley*, 219 F.3d 132, 138 (2d Cir.2000) (holding summary judgment inappropriate where there

was evidence that, *inter alia*, plaintiff was delayed dental treatment for a cavity for one year); *Hathaway v. Coughlin*, 841 F.2d 48, 50-51 (2d Cir.1988) ("[Plaintiffs] affidavit in opposition to [defendants'] motion for summary judgment alleged that a delay of over two years in arranging surgery ... amounted to deliberate indifference to his serious medical needs. We believe this is a sufficient allegation to survive a motion for summary judgment under *Archer v. Dutcher*, 733 F.2d 14 (2d Cir.1984) ] because it raises a factual dispute ...."); *see also Lloyd v. Lee*, 570 F.Supp.2d 556, 569 (S.D.N.Y.2008) ("A reasonable jury could infer deliberate indifference from the failure of the doctors to take further steps to see that [plaintiff] was given an MRI. The argument that the doctors here did not take [plaintiff's] condition seriously is plausible, given the length of the delays. Nine months went by after the MRI was first requested before the MRI was actually taken.").

Defendants point to evidence in the record that they were, in fact, attempting to get plaintiff tested throughout the time in question, but were unsuccessful in their efforts. (See Defs.' Br. at 23; Reschke Aff. ¶ 3.) However, defendants' proffered explanation for the delay, i.e., the difficulty of finding a hospital because of transportation and security concerns, raises questions of fact and does not, as a matter of law, absolve them of liability. See *Johnson v. Bowers*, 884 F.2d 1053, 1056 (8th Cir.1989) ("It is no excuse for [defendants] to urge that the responsibility for delay in surgery rests with [the hospital]."); *Williams v. Scully*, 552 F.Supp. 431, 432 (S.D.N.Y.1982) (denying summary judgment where plaintiff "was unable to obtain treatment ... for five and one half months, during which time he suffered considerable pain" despite defendants' "explanations for the inadequacy of [the prison's] dental program"), cited approvingly in *Harrison v. Barkley*, 219 F.3d 132, 138 (2d Cir.2000). Thus, whether defendants' efforts were reasonable over the nine month period at issue is a question of fact for the jury.

In sum, on this record, drawing all reasonable inferences in plaintiff's favor, the Court concludes that a rational jury could find that defendants acted with deliberate indifference regarding plaintiff's request for a kidney transplant test. Accordingly, defendants' motion for summary judgment on this claim is denied.

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c. Shoulder

Defendants argue that summary judgment is warranted on the claim relating to the alleged shoulder injury because plaintiff's complained-of shoulder pain was not objectively serious and plaintiff has failed to show subjectively culpable intent by defendants. For the reasons set forth below, the Court disagrees and concludes that a rational jury could find that defendants acted with deliberate indifference \*363 regarding plaintiff's shoulder pain. Thus, summary judgment on this claim is denied.

i. Objective Prong

[18][19] Defendants argue that plaintiff cannot satisfy the objective element of the deliberate indifference test regarding his shoulder because plaintiff alleges only that he had pain in his shoulder and not that he had "a condition of urgency, one that might produce death, deterioration or extreme pain." (Defs.' Br. at 22.) However, plaintiff did complain to the medical department that his right shoulder was "extremely hurting." (Defs.' Ex. E, Sick Call Request, Jan. 17, 2007.) Furthermore, plaintiff states that he now has a separated shoulder and wears a brace for carpal tunnel syndrome. (Pl.'s Opp. at 4.) In any event, chronic pain can be a serious medical condition. *See Brock v. Wright, 315 F.3d 158, 163 (2d Cir.2003)* ("We will no more tolerate prison officials' deliberate indifference to the chronic pain of an inmate than we would a sentence that required the inmate to submit to such pain. We do not, therefore, require an inmate to demonstrate that he or she experiences pain that is at the limit of human ability to bear, nor do we require a showing that his or her condition will degenerate into a life-threatening one."); *Hathaway v. Coughlin, 37 F.3d 63, 67 (2d Cir.1994)*; *see also Sereika v. Patel, 411 F.Supp.2d 397, 406 (S.D.N.Y.2006)* ("[Plaintiff's] allegation that he experienced severe pain as a result of the alleged delay in treatment, together with his allegation that the alleged delay in treatment resulted in reduced mobility in his arm and shoulder, raise issues of fact as to whether his shoulder injury constitutes a sufficiently serious medical condition to satisfy the objective prong of the deliberate indifference standard.") (denying summary judgment). Thus, the Court cannot conclude at the summary judgment stage that plaintiff did not suffer from a serious medical condition.

ii. Subjective Prong

Defendants also argue that plaintiff cannot meet the subjective prong of the deliberate indifference test because plaintiff was seen repeatedly by the medical department and was given pain medication. (Defs.' Br. at 22.) Defendants also point to the fact that when x-rays were ultimately taken, they were negative.<sup>FN18</sup> However, construing the facts most favorably to plaintiff, a rational jury could find that defendants were aware of, and consciously disregarded, plaintiff's serious medical needs. Plaintiff repeatedly complained to defendants over a period of several months, beginning in January 2007, about the pain in his shoulder (see Defs.' Ex. E), and further complained that the pain medication he was being given was ineffective.<sup>FN19</sup> (See, e.g., Price Dep. at 45, 51.) In June 2007, for instance, plaintiff was still complaining that his right shoulder "hurts really bad," and that he had been "complaining of that for months." (Def.'s Ex. E, Sick Call Requests, June 12 and June 17, 2007.) Thus, it is uncontested that defendants were aware of plaintiff's alleged chronic shoulder pain.

<sup>FN18</sup>. The November 2007 x-ray records indicate that "short segment acute thrombosis cannot be reliably excluded, Ultrasound might provide additional information ...." (See Defs.' Ex. J, Discharge Summary, November 2007.) Defendants point to no evidence in the record that they followed up on that x-ray report.

<sup>FN19</sup>. Plaintiff also informed defendants that he had been given a Cortisone shot for his shoulder at his previous place of incarceration. (See Price Dep. at 38, 53-54; Defs.' Ex. E, Sick Call Request, Apr. 14, 2007.)

Despite plaintiff's complaints, however, plaintiff was not given an x-ray exam for several months (Price Dep. at 44; Def.'s \*364 Ex. J), and was not given any pain medication besides Motrin and Naprosyn. (Price Dep. at 55.) Although defendants argue that the treatment for plaintiff's shoulder pain was reasonable under the circumstances, there are factual questions in this case that preclude

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summary judgment. *See Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir.1998) (“Whether a course of treatment was the product of sound medical judgment, negligence, or deliberate indifference depends on the facts of the case.”) (reversing grant of motion to dismiss). Drawing all reasonable inferences from the facts in favor of plaintiff, a rational jury could find that defendants acted with deliberate indifference by not changing plaintiff's pain medication despite his continued complaints that it was ineffective, by failing to take x-rays for several months, and by failing to follow-up on a November 2007 x-ray report indicating that further tests might be needed (see Defs.' Ex. J, Discharge Summary, November 2007). *See Brock*, 315 F.3d at 167 (“It is not controverted that [defendant] was aware that [plaintiff] was suffering some pain from his scar. The defendants sought to cast doubt on the truthfulness of [plaintiff's] claims about the extent of the pain he was suffering and, also, to put into question DOCS' awareness of [plaintiff's] condition. But at most, defendants' arguments and evidence to these effects raise issues for a jury and do not justify summary judgment for them.”); *Hathaway*, 37 F.3d at 68-69 (holding that, *inter alia*, two-year delay in surgery despite plaintiff's repeated complaints of pain could support finding of deliberate indifference). The fact that defendants offered some treatment in response to plaintiff's complaints does not as a matter of law establish that they had no subjectively culpable intent. *See Archer v. Dutcher*, 733 F.2d 14, 16 (2d Cir.1984) (“[Plaintiff] received extensive medical attention, and the records maintained by the prison officials and hospital do substantiate the conclusion that [defendants] provided [plaintiff] with comprehensive, if not doting, health care. Nonetheless, [plaintiff's] affidavit in opposition to the motion for summary judgment does raise material factual disputes, irrespective of their likely resolution.... [Plaintiff's assertions] do raise material factual issues. After all, if defendants did decide to delay emergency medical-aid—even for ‘only’ five hours—in order to make [plaintiff] suffer, surely a claim would be stated under *Estelle*.”). Specifically, given the factual disputes in this case, the Court cannot conclude as a matter of law that defendants did not act with deliberate indifference when they allegedly declined to change their treatment for plaintiff's shoulder pain despite repeated complaints over several months that the pain persisted. *See, e.g.*, *Lloyd*, 570 F.Supp.2d at 569 (“[T]he amended complaint plausibly alleges that doctors knew that [plaintiff] was experiencing extreme pain and loss of mobility, knew that the course of treatment they prescribed was ineffective, and declined to do anything to attempt to improve

[plaintiff's] situation besides re-submitting MRI request forms.... Had the doctors followed up on numerous requests for an MRI, the injury would have been discovered earlier, and some of the serious pain and discomfort that [plaintiff] experienced for more than a year could have been averted.”). Thus, there are factual disputes that prevent summary judgment on defendants' subjective intent.

In sum, on this record, drawing all reasonable inferences from the facts in favor of plaintiff, a rational jury could find that defendants acted with deliberate indifference to plaintiff's shoulder pain. Accordingly, defendants' motion for summary judgment on this claim is denied.

#### \*365 C. Individual Defendants

Defendants also move for summary judgment specifically with respect to plaintiff's claims against three of the individual defendants: Sheriff Edward Reilly (hereinafter “Reilly”), Edwards, and Okonta. For the reasons set forth below, the Court grants defendants' motion with respect to Reilly, and denies it with respect to Edwards and Okonta.

##### 1. Legal Standard

[20] “It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under Section 1983.” *Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir.2003) (citation and quotation marks omitted). In other words, “supervisor liability in a § 1983 action depends on a showing of some personal responsibility, and cannot rest on respondeat superior.” *Id.* Supervisor liability can be shown in one or more of the following ways: “(1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring.” *Id. at 145* (citation omitted).

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## 2. Application

[21] Although plaintiff alleges in the complaint that Reilly was aware of plaintiff's condition and failed to assist,<sup>FN20</sup> there is no mention whatsoever of Reilly in plaintiff's deposition or in any of the parties' evidentiary submissions. Because there is no evidence in the record that Reilly was personally involved in any of the alleged constitutional violations or that there was a custom or policy of allowing such constitutional violations (and that Reilly allowed such custom or policy to continue), no rational jury could find Reilly liable for any of plaintiff's deliberate indifference claims. *See Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003) ("[M]ere linkage in the prison chain of command is insufficient to implicate a state commissioner of corrections or a prison superintendent in a § 1983 claim."); *see also Mastroianni v. Reilly*, 602 F.Supp.2d 425, 438-39 (E.D.N.Y.2009) ("[T]he plaintiff cannot establish that Sheriff Reilly was grossly negligent in failing to supervise subordinates because the medical care of inmates at the NCCC was delegated to the Nassau Health Care Corporation and plaintiff provides no evidence that Reilly was otherwise personally involved in his treatment."). Therefore, defendants' motion for summary judgment with respect to plaintiff's claims against Sheriff Reilly is granted.

<sup>FN20</sup> Plaintiff actually refers in the complaint to "Sheriff Edwards," but the Court determines, liberally construing the complaint, that this allegation refers to Sheriff Reilly.

[22] With respect to plaintiff's claims against Edwards and Okonta, however, there are disputed issues of fact that preclude summary judgment. Defendants argue that Edwards was not personally involved in the alleged constitutional violations because she did not treat plaintiff and merely responded to his grievance request. (Defs.' Br. at 24-25.) However, plaintiff testified that, although Edwards never physically treated him, she "takes care of appointments and makes sure you get to certain specialists" and that "she was in a position to make sure that I get the adequate care that I needed." (Price Dep. at 61-62.) Plaintiff also testified that he submitted a grievance request to \*366 Edwards in order to be tested for the kidney transplant list, but that Edwards failed to get him on the list. (Price Dep. at 62-63.) Drawing all

reasonable inferences in favor of plaintiff, a rational jury could find that Edwards was personally involved in the alleged constitutional violations because she was in a position to get plaintiff tested for the kidney transplant list and failed to do so. *See McKenna v. Wright*, 386 F.3d 432, 437-38 (2d Cir.2004) ("Although it is questionable whether an adjudicator's rejection of an administrative grievance would make him liable for the conduct complained of, [defendant] was properly retained in the lawsuit at this stage, not simply because he rejected the grievance, but because he is alleged, as Deputy Superintendent for Administration at [the prison], to have been responsible for the prison's medical program." (citation omitted)). Thus, plaintiff has presented sufficient evidence of Edwards's personal involvement in the alleged constitutional violations to raise a genuine issue of material fact as to whether Edwards is liable for the alleged Eighth Amendment violations.

[23][24] Defendants also argue that Okonta was not personally involved in the alleged constitutional violations because he did not actually treat plaintiff. (Defs.' Br. at 24-25.) This argument misses the mark. It is plaintiff's allegation that Okonta violated plaintiff's constitutional rights precisely by not treating him. Plaintiff has presented evidence that he received no response from Okonta regarding his requests to be tested for the kidney transplant list. Where a prison doctor denies medical treatment to an inmate, that doctor is personally involved in the alleged constitutional violation. *See McKenna*, 386 F.3d at 437 (finding "personal involvement" where medical defendants were alleged to have participated in the denial of treatment); *see also Chambers v. Wright*, No. 05 Civ. 9915, 2007 WL 4462181, at \*3 (S.D.N.Y. Dec. 19, 2007) ("Prison doctors who have denied medical treatment to an inmate are 'personally involved' for the purposes of jurisdiction under § 1983." (citing *McKenna*, 386 F.3d at 437)). Although defendants argue that they were in fact making efforts to get plaintiff tested (Defs.' Br. at 25), the reasonableness of those efforts, as discussed above, is a factual question inappropriate for resolution on summary judgment.

In sum, defendants' motion for summary judgment on plaintiff's claims against Reilly is granted. Defendants' motion with respect to Edwards and Okonta is denied.

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V. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part defendants' motion for summary judgment. Specifically, the Court grants defendants' motion with respect to plaintiff's claim regarding the dosage of his renal disease medication and with respect to all of plaintiff's claims against Sheriff Reilly. Defendants' motion is denied in all other respects. The parties to this action shall participate in a telephone conference on Monday, April 5, 2010 at 3:30 p.m. At that time, counsel for defendants shall initiate the call and, with all parties on the line, contact Chambers at (631) 712-5670.

SO ORDERED.

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**C** Only the Westlaw citation is currently available.

United States District Court, N.D. New York.  
Jerome WALDO, Plaintiff,  
v.  
Glenn S. GOORD, Acting Commissioner of New York  
State Department of Correctional Services; Peter J.  
Lacy, Superintendent at Bare Hill Corr. Facility;  
Wendell Babbie, Acting Superintendent at Altona Corr.  
Facility; and John Doe, Corrections Officer at Bare Hill  
Corr. Facility, Defendants.  
**No. 97-CV-1385 LEK DRH.**

Oct. 1, 1998.

Jerome Waldo, Plaintiff, pro se, Mohawk Correctional Facility, Rome, for Plaintiff.

Hon. Dennis C. Vacco, Attorney General of the State of New York, Albany, Eric D. Handelman, Esq., Asst. Attorney General, for Defendants.

#### DECISION AND ORDER

KAHN, District J.

\*1 This matter comes before the Court following a Report-Recommendation filed on August 21, 1998 by the Honorable David R. Homer, Magistrate Judge, pursuant to 28 U.S.C. § 636(b) and L.R. 72.3(c) of the Northern District of New York.

No objections to the Report-Recommendation have been raised. Furthermore, after examining the record, the Court has determined that the Report-Recommendation is not clearly erroneous. *See*Fed.R.Civ.P. 72(b), Advisory

Committee Notes. Accordingly, the Court adopts the Report-Recommendation for the reasons stated therein.

Accordingly, it is

ORDERED that the Report-Recommendation is APPROVED and ADOPTED; and it is further

ORDERED that the motion to dismiss by defendants is GRANTED; and it is further

ORDERED that the complaint is dismissed without prejudice as to the unserved John Doe defendant pursuant to Fed.R.Civ.P. 4(m), and the action is therefore dismissed in its entirety; and it is further

ORDERED that the Clerk serve a copy of this order on all parties by regular mail.

IT IS SO ORDERED.  
HOMER, Magistrate J.

#### REPORT-RECOMMENDATION AND ORDER FN1

FN1. This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(c).

The plaintiff, an inmate in the New York Department of Correctional Services (“DOCS”), brought this pro se action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that while incarcerated in Bare Hill Correctional Facility (“Bare Hill”) and Altona Correctional Facility (“Altona”), defendants violated his rights under the Eighth and Fourteenth Amendments.FN2 In particular, plaintiff alleges that prison officials maintained overcrowded facilities resulting in physical and emotional injury to the plaintiff

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and failed to provide adequate medical treatment for his injuries and drug problem. Plaintiff seeks declaratory relief and monetary damages. Presently pending is defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b). Docket No. 18. For the reasons which follow, it is recommended that the motion be granted in its entirety.

FN2. The allegations as to Bare Hill are made against defendants Goord, Lacy, and Doe. Allegations as to Altona are made against Goord and Babbie.

### I. Background

Plaintiff alleges that on August 21, 1997 at Bare Hill, while he and two other inmates were playing cards, an argument ensued, and one of the two assaulted him. Compl., ¶ 17. Plaintiff received medical treatment for facial injuries at the prison infirmary and at Malone County Hospital. *Id.* at ¶¶ 18-19. On September 11, 1997, plaintiff was transferred to Altona and went to Plattsburgh Hospital for x-rays several days later. *Id.* at ¶ 21.

Plaintiff's complaint asserts that the overcrowded conditions at Bare Hill created a tense environment which increased the likelihood of violence and caused the physical assault on him by another inmate. *Id.* at ¶¶ 10-11. Additionally, plaintiff contends that similar conditions at Altona caused him mental distress and that he received constitutionally deficient medical treatment for his injuries. *Id.* at ¶¶ 21-22. The complaint alleges that Altona's lack of a drug treatment program and a dentist or specialist to treat his facial injuries constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Id.* at ¶¶ 22, 27-28.

### II. Motion to Dismiss

\*2 When considering a Rule 12(b) motion, a court must assume the truth of all factual allegations in the complaint and draw all reasonable inferences from those facts in favor of the plaintiff. Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir.1996). The complaint may be dismissed only when "it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Staron v. McDonald's Corp., 51 F.3d 353, 355 (2d Cir.1995) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "The issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleading that a recovery is very remote and unlikely, but that is not the test." Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir.1995) (citations omitted). This standard receives especially careful application in cases such as this where a pro se plaintiff claims violations of his civil rights. Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir.), cert. denied, 513 U.S. 836, 115 S.Ct. 117, 130 L.Ed.2d 63 (1994).

### III. Discussion

#### A. Conditions of Confinement

Defendants assert that plaintiff fails to state a claim regarding the conditions of confinement at Bare Hill and Altona. For conditions of confinement to amount to cruel and unusual punishment, a two-prong test must be met. First, plaintiff must show a sufficiently serious deprivation. Farmer v. Brennan, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (citing Wilson v. Seiter, 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)); Rhodes v. Chapman, 452 U.S. 347, 348 (1981)(denial of the "minimal civilized measure of life's necessities"). Second, plaintiff must show that the prison official involved was both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]" and that the official drew the inference. Farmer, 511 U.S. at 837.

#### 1. Bare Hill

In his Bare Hill claim, plaintiff alleges that the overcrowded and understaffed conditions in the dormitory-style housing "resulted in an increase in tension, mental anguish and frustration among prisoners, and dangerously increased the potential for violence." Compl.,

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¶ 11. Plaintiff asserts that these conditions violated his constitutional right to be free from cruel and unusual punishment and led to the attack on him by another prisoner. The Supreme Court has held that double-celling to manage prison overcrowding is not a *per se* violation of the Eighth Amendment. *Rhodes*, 452 U.S. at 347-48. The Third Circuit has recognized, though, that double-celling paired with other adverse circumstances can create a totality of conditions amounting to cruel and unusual punishment. [\*Nami v. Fauver\*, 82 F.3d 63, 67 \(3d Cir.1996\)](#). While plaintiff here does not specify double-celling as the source of his complaint, the concerns he raises are similar. Plaintiff alleges that overcrowding led to an increase in tension and danger which violated his rights. Plaintiff does not claim, however, that he was deprived of any basic needs such as food or clothing, nor does he assert any injury beyond the fear and tension allegedly engendered by the overcrowding. Further, a previous lawsuit by this plaintiff raised a similar complaint, that double-celling and fear of assault amounted to cruel and unusual punishment, which was rejected as insufficient by the court. [\*Bolton v. Goord\*, 992 F.Supp. 604, 627 \(S.D.N.Y.1998\)](#). The court there found that the fear created by the double-celling was not “an objectively serious enough injury to support a claim for damages.” *Id.* (citing [\*Doe v. Welborn\*, 110 F.3d 520, 524 \(7th Cir.1997\)](#)).

\*3 As in his prior complaint, plaintiff's limited allegations of overcrowding and fear, without more, are insufficient. Compare [\*Ingalls v. Florio\*, 968 F.Supp. 193, 198 \(D.N.J.1997\)](#) (Eighth Amendment overcrowding claim stated when five or six inmates are held in cell designed for one, inmates are required to sleep on floor, food is infested, and there is insufficient toilet paper) and [\*Zolnowski v. County of Erie\*, 944 F.Supp. 1096, 1113 \(W.D.N.Y.1996\)](#) (Eighth Amendment claim stated when overcrowding caused inmates to sleep on mattresses on floor, eat meals while sitting on floor, and endure vomit on the floor and toilets) with [\*Harris v. Murray\*, 761 F.Supp. 409, 415 \(E.D.Va.1990\)](#) (No Eighth Amendment claim when plaintiff makes only a generalized claim of overcrowding unaccompanied by any specific claim concerning the adverse effects of overcrowding). Thus, although overcrowding could create conditions which might state a violation of the Eighth Amendment, plaintiff has not alleged sufficient facts to support such a finding here. Plaintiff's conditions of confinement claim as to Bare

Hill should be dismissed.

## 2. Altona

Plaintiff also asserts a similar conditions of confinement claim regarding Altona. For the reasons discussed above, plaintiff's claim that he suffered anxiety and fear of other inmates in the overcrowded facility (Compl., ¶¶ 21-22) is insufficient to establish a serious injury or harm.

Plaintiff's second claim regarding Altona relates to the alleged inadequacies of the medical treatment he received. The government has an “obligation to provide medical care for those whom it is punishing by incarceration.” [\*Estelle v. Gamble\*, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 \(1976\)](#). The two-pronged *Farmer* standard applies in medical treatment cases as well. [\*Hemmings v. Gorczyk\*, 134 F.3d 104, 108 \(2d Cir.1998\)](#). Therefore, plaintiff must allege facts which would support a finding that he suffered a sufficiently serious deprivation of his rights and that the prison officials acted with deliberate indifference to his medical needs. [\*Farmer\*, 511 U.S. at 834](#).

Plaintiff alleges that the medical treatment available at Altona was insufficient to address the injuries sustained in the altercation at Bare Hill. Specifically, plaintiff cites the lack of a dentist or specialist to treat his facial injuries as an unconstitutional deprivation. Plaintiff claims that the injuries continue to cause extreme pain, nosebleeds, and swelling. Compl., ¶¶ 22 & 26. For the purposes of the [Rule 12\(b\)](#) motion, plaintiff's allegations of extreme pain suffice for a sufficiently serious deprivation. See [\*Hathaway v. Coughlin\*, 99 F.3d 550, 553 \(2d Cir.1996\)](#).

Plaintiff does not, however, allege facts sufficient to support a claim of deliberate indifference by the named defendants. To satisfy this element, plaintiff must demonstrate that prison officials had knowledge of facts from which an inference could be drawn that a “substantial risk of serious harm” to the plaintiff existed and that the officials actually drew the inference. [\*Farmer\*, 511 U.S. at 837](#). Plaintiff's complaint does not support, even when liberally construed, any such conclusion. Plaintiff offers

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no evidence that the Altona Superintendent or DOCS Commissioner had any actual knowledge of his medical condition or that he made any attempts to notify them of his special needs. Where the plaintiff has not even alleged knowledge of his medical needs by the defendants, no reasonable jury could conclude that the defendants were deliberately indifferent to those needs. *See Amos v. Maryland Dep't of Public Safety and Corr. Services*, 126 F.3d 589, 610-11 (4th Cir.1997), vacated on other grounds, 524 U.S. 935, 118 S.Ct. 2339, 141 L.Ed.2d 710 (1998).

\*4 Plaintiff's second complaint about Altona is that it offers "no type of state drug treatment program for the plaintiff." Compl., ¶ 22. Constitutionally required medical treatment encompasses drug addiction therapy. *Fiallo v. de Batista*, 666 F.2d 729, 731 (1st Cir.1981); *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 760-61 (3d Cir.1979). As in the *Fiallo* case, however, plaintiff falls short of stating an Eighth Amendment claim as he "clearly does not allege deprivation of essential treatment or indifference to serious need, only that he has not received the type of treatment which he desires." *Id.* at 731. Further, plaintiff alleges no harm or injury attributable to the charged deprivation. Plaintiff has not articulated his reasons for desiring drug treatment or how he was harmed by the alleged deprivation of this service. *See Guidry v. Jefferson County Detention Ctr.*, 868 F.Supp. 189, 192 (E.D.Tex.1994) (to state a section 1983 claim, plaintiff must allege that some injury has been suffered).

For these reasons, plaintiff's Altona claims should be dismissed.

#### B. Failure to Protect

Defendants further assert that plaintiff has not established that any of the named defendants failed to protect the plaintiff from the attack by the other inmate at Bare Hill. Prison officials have a duty "to act reasonably to ensure a safe environment for a prisoner *when they are aware* that there is a significant risk of serious injury to that prisoner." *Heisler v. Kralik*, 981 F.Supp. 830, 837 (S.D.N.Y.1997) (emphasis added); *see also Villante v. Dep't of Corr. of City of N.Y.*, 786 F.2d 516, 519 (2d

Cir.1986). This duty is not absolute, however, as "not ... every injury suffered by one prisoner at the hands of another ... translates into constitutional liability." *Farmer*, 511 U.S. at 834. To establish this liability, *Farmer's* familiar two-prong standard must be satisfied.

As in the medical indifference claim discussed above, plaintiff's allegations of broken bones and severe pain from the complained of assault suffice to establish a "sufficiently serious" deprivation. *Id.* Plaintiff's claim fails, however, to raise the possibility that he will be able to prove deliberate indifference to any threat of harm to him by the Bare Hill Superintendent or the DOCS Commissioner. Again, plaintiff must allege facts which establish that these officials were aware of circumstances from which the inference could be drawn that the plaintiff was at risk of serious harm and that they actually inferred this. *Farmer*, 511 U.S. at 838.

To advance his claim, plaintiff alleges an increase in "unusual incidents, prisoner misbehaviors, and violence" (Compl., ¶ 12) and concludes that defendants' continued policy of overcrowding created the conditions which led to his injuries. Compl., ¶ 10. The thrust of plaintiff's claim seems to suggest that the defendants' awareness of the problems of overcrowding led to knowledge of a generalized risk to the prison population, thus establishing a legally culpable state of mind as to plaintiff's injuries. Plaintiff has not offered any evidence, however, to support the existence of any personal risk to himself about which the defendants could have known. According to his own complaint, plaintiff first encountered his assailant only minutes before the altercation occurred. Compl., ¶ 17. It is clear that the named defendants could not have known of a substantial risk to the plaintiff's safety if the plaintiff himself had no reason to believe he was in danger. *See Sims v. Bowen*, No. 96-CV-656, 1998 WL 146409, at \*3 (N.D.N.Y. Mar.23, 1998) (Pooler, J.) ("I conclude that an inmate must inform a correctional official of the basis for his belief that another inmate represents a substantial threat to his safety before the correctional official can be charged with deliberate indifference"); *Strano v. City of New York*, No. 97-CIV-0387, 1998 WL 338097, at \*3-4 (S.D.N.Y. June 24, 1998) (when plaintiff acknowledged attack was "out of the blue" and no prior incidents had occurred to put defendants on notice of threat or danger, defendants could not be held aware of any substantial risk

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of harm to the plaintiff). Defendants' motion on this ground should, therefore, be granted.

Racette, 984 F.2d 85, 89 (2d Cir.1993); Small v. Secretary of Health and Human Services, 892 F.2d 15 (2d Cir.1989); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

#### IV. Failure to Complete Service

\*5 The complaint names four defendants, including one "John Doe" Correctional Officer at Bare Hill. Defendants acknowledge that service has been completed as to the three named defendants. Docket Nos. 12 & 13. The "John Doe" defendant has not been served with process or otherwise identified and it is unlikely that service on him will be completed in the near future. *See* Docket No. 6 (United States Marshal unable to complete service on "John Doe"). Since over nine months have passed since the complaint was filed (Docket No. 1) and summonses were last issued (Docket entry Oct. 21, 1997), the complaint as to the unserved defendant should be dismissed without prejudice pursuant to Fed.R.Civ.P. 4(m) and N.D.N.Y.L.R. 4.1(b).

N.D.N.Y.,1998.

Waldo v. Goord

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#### V. Conclusion

WHEREFORE, for the reasons stated above, it is

RECOMMENDED that defendants' motion to dismiss be GRANTED in all respects; and

IT IS FURTHER RECOMMENDED that the complaint be dismissed without prejudice as to the unserved John Doe defendant pursuant to Fed.R.Civ.P. 4(m) and N.D.N.Y.L.R. 4.1(b); and it is

ORDERED that the Clerk of the Court serve a copy of this Report-Recommendation and Order, by regular mail, upon parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. Roldan v.



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## H

Only the Westlaw citation is currently available.

United States District Court,

N.D. New York.

Cory CALDWELL, Plaintiff,

v.

WINSTON, Correctional Officer, Gettmann,  
Correctional Officer, and J. Stout, Medical Nurse,  
Defendants.

Civ. Action No. 9:09-CV-580 (DNH/DEP).

July 23, 2010.

Cory Caldwell, Malone, NY, pro se.

Hon. Andrew M. Cuomo, Office of the Attorney General,  
State of New York, Department of Law, Adrienne J.  
Kerwin, Esq., Assistant Attorney General, Albany, NY,  
For Defendants.

### REPORT AND RECOMMENDATION

DAVID E. PEEBLES, United States Magistrate Judge.

\*1 Plaintiff Cory Caldwell, a New York State prison **inmate** who is proceeding *pro se* and *in forma pauperis*, has commenced this action pursuant to 42 U.S.C. §§ 1983 and 1985, claiming deprivation of his civil rights. In his complaint plaintiff asserts that he was assaulted by the two corrections officer defendants, and that following the assault he was denied medical treatment for his resulting injuries. In his complaint plaintiff seeks compensatory and punitive damages in the amounts of \$30 million and \$10 million, respectively.

Currently pending before the court is defendants' motion to dismiss the complaint. In support of their motion, defendants assert that plaintiff has failed to state a plausible Eighth Amendment violation. Having carefully reviewed the record, considered in light of the arguments of the parties, for the reasons that follow I recommend that defendants' motion be granted in part, but otherwise denied.

### I. BACKGROUND<sup>FN1</sup>

FN1. In light of the procedural posture of this case, the following recitation is drawn principally from plaintiff's amended complaint, the contents of which have been accepted as true for purposes of the pending motion. See Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 2200 (2007) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S.Ct. 1955, 1965 (2007)); see also Cooper v. Pate, 378 U.S. 546, 546, 84 S.Ct. 1733, 1734 (1964).

The facts forming the basis for plaintiff's claims are not particularly complex. Plaintiff is a prison **inmate** entrusted to the care and custody of the New York State Department of Correctional Services ("DOCS"); at the times relevant to his complaint, Caldwell was housed at the Upstate Correctional Facility ("Upstate"), located in Malone, New York.<sup>FN2</sup> Amended Complaint (Dkt. No. 9) ¶ 10. On December 18, 2009, while being escorted back from a disciplinary hearing to his cell, which was located in A Block of Building Nine, plaintiff was taunted by defendants Winston and Gettmann regarding the time in SHU to which he had just been sentenced. *Id.* at ¶ 10. When plaintiff responded, defendant Winston instructed him to face forward and, when Caldwell did not comply quickly enough, Winston grabbed him by the neck and slammed the front of his body and his face into the wall. *Id.* at ¶¶ 2, 17. Gettmann then moved in closer and, putting his left hand on plaintiff's waist, gave Caldwell a short jab in the ribs with his right hand, stating in a low voice, "You're not as tough as you are behind that door; then again, you young punks never are." *Id.* After making that remark, Gettmann pulled Caldwell off of the wall, and they continued toward plaintiff's cell. *Id.*

FN2. Upstate is a maximum security prison comprised exclusively of special housing unit ("SHU") cells in which **inmates** are confined, generally though not always for disciplinary reasons, for twenty-three hours each day. See Samuels v. Selsky, No. 01 CIV. 8235, 2002 WL

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31040370, at \*4 n. 11 (S.D.N.Y. Sept. 12, 2002).

Upon arriving at his cell, plaintiff followed Gettmann's instructions to place his hands through the feed up slot for removal of his handcuffs. Amended Complaint (Dkt. No. 9) ¶¶ 3, 18. Gettmann proceeded to roughly remove plaintiff's handcuffs. *Id.* at ¶ 3. After removing the restraints, Gettmann did not instruct plaintiff to remove his hands from the feed up slot, as is customary; instead, before plaintiff had time to withdraw his hands, Gettmann intentionally slammed Caldwell's hands and wrist in the feed up slot door, causing injury for which plaintiff sought emergency medical attention. *Id.* at ¶¶ 3-4, 19.

Approximately twenty minutes later defendant J. Stout, a medical nurse, arrived and made a routine visual inspection of plaintiff's injuries through the glass on plaintiff's cell and advised plaintiff that there was nothing wrong with him and that his injuries did not warrant emergency medical attention. Amended Complaint (Dkt. No. 9) ¶¶ 5, 19. When plaintiff protested and showed Stout the blood on his hands, Stout taunted plaintiff, stating in a low voice, "Oh, he's got a little boo-boo," and then proceeded to walk away. *Id.* at ¶ 5.

\*2 Speaking loudly enough for a nearby audio microphone to record his complaint, plaintiff voiced his dismay, apparently accusing Stout of unethical and unprofessional conduct and stating that he was bleeding and that his medical needs were being disregarded. <sup>FN3</sup> *Id.* at ¶ 5, 20. Within minutes, a sergeant appeared at Caldwell's cell and escorted him to a holding pen, where photographs of plaintiff's injuries were taken. *Id.* at ¶¶ 5-6.

<sup>FN3</sup> In addition to the audio recording and photographs, plaintiff states that a video recording of the incident exists.

Plaintiff claims to have written several grievances complaining of the incident, as well as letters to the facility superintendent, the commissioner of the DOCS, counsel for the DOCS, the DOCS inspector general, and the New York State Police, but has received a response only from Commissioner Brian Fischer stating that the inspector general was investigating the incident. Amended Complaint (Dkt. No. 9) ¶¶ 6, 22-23. According to plaintiff,

as a result of the assault and the unspecified injuries that he sustained, he has and continues to suffer periods of substantial pain in his neck and sharp pain in his hands. *Id.* at ¶ 7.

II. PROCEDURAL HISTORY

Plaintiff commenced this action on May 18, 2009. Dkt. No. 1. As defendants, plaintiff's original complaint named John Doe, an unknown corrections officer; Gettmann, corrections officer; Stout, J., a medical nurse; and the DOCS. *Id.* After an initial review of the complaint, the court *sua sponte* dismissed plaintiff's claims against the DOCS and directed plaintiff to take reasonable steps to ascertain the identity of the John Doe defendant named in the complaint. *See* Decision and Order dated June 10, 2009 (Dkt. No. 7). In accordance with that directive, plaintiff subsequently filed an amended complaint, Dkt. No. 9, which is now the operative pleading in this action, identifying "correctional officer" Winston as a defendant in place of John Doe. <sup>FN4</sup> The complaint, which is brought under 42 U.S.C. §§ 1983 and 1985, <sup>FN5</sup> alleges negligence, the use of excessive force, and deliberate indifference to plaintiff's medical needs arising out of the incident, all in violation of the Eighth Amendment. *See generally* Amended Complaint (Dkt. No. 9).

<sup>FN4</sup> By order dated July 29, 2009, the clerk was directed to replace "John Doe, Corrections Officer" with "Winston, Correctional Officer." Additionally, because the amended complaint again named the DOCS as a defendant, despite the fact that plaintiff was previously advised by the court that state agencies such as the DOCS are entitled to immunity from suit under the Eleventh Amendment, the court once again dismissed the DOCS from the lawsuit and directed that the clerk issue summonses for service only upon the individual named defendants. *See* Dkt. No. 10.

<sup>FN5</sup> Defendants have not addressed plaintiff's section 1985 claim in their motion. To sustain a cause of action for conspiracy to violate civil rights under section 1985(3), a plaintiff must allege and demonstrate that defendants acted with racial or other class-based animus in

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conspiring to deprive the plaintiff of his or her equal protection of the laws, or of equal privileges and immunity secured by law. *United Brotherhood of Carpenters & Joiners, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 834-39, 103 S.Ct. 3352, 3359-61 (1983). There is only a single reference to section 1985 in plaintiff's complaint, and no facts are alleged to support that claim.

Following service of plaintiff's amended complaint, defendants moved on October 13, 2009 seeking its dismissal. Dkt. No. 17. In their motion, defendants argue that plaintiff's complaint fails to set forth facts demonstrating the existence of plausible claims of unlawful use of excessive force and deliberate medical indifference. *Id.* Defendants' motion, which plaintiff has opposed, is now fully briefed and ripe for determination and has been referred to me for the issuance of a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72.3(c). *See also Fed.R.Civ.P. 72(b).*

### III. DISCUSSION

#### A. Dismissal Motion Standard

A motion to dismiss a complaint, brought pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, calls upon a court to gauge the facial sufficiency of that pleading, utilizing as a backdrop a pleading standard which, though unexacting in its requirements, "demands more than an unadorned, the-defendant-unlawfully-harmed me accusation" in order to withstand scrutiny. *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555, 127 S.Ct. 1955, (2007)). Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). *Id.* While modest in its requirement, that rule commands that a complaint contain more than mere legal conclusions; "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft*, 129 S.Ct. at 1950.

\*3 To withstand a motion to dismiss, a complaint must plead sufficient facts which, when accepted as true, state a claim which is plausible on its face. *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir.2008) (citing *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974). As the Second Circuit has observed, "[w]hile *Twombly* does not require heightened fact pleading of specifics, it does require enough facts to 'nudge [plaintiffs'] claims across the line from conceivable to plausible.' " *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir.2007) (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974).

In deciding a Rule 12(b)(6) dismissal motion, the court must accept the material facts alleged in the complaint as true and draw all inferences in favor of the non-moving party. *Cooper v. Pate*, 378 U.S. 546, 546, 84 S.Ct. 1723, 1734 (1964); *Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 300 (2d Cir.2003), cert. denied, 540 U.S. 823, 124 S.Ct. 153 (2003); *Burke v. Gregory*, 356 F.Supp.2d 179, 182 (N.D.N.Y.2005) (Kahn, J.). The burden undertaken by a party requesting dismissal of a complaint under Rule 12(b)(6) is substantial; the question presented by such a motion is not whether the plaintiff is likely ultimately to prevail, "but whether the claimant is entitled to offer evidence to support the claims." *Log On America, Inc. v. Promethean Asset Mgmt. L.L.C.*, 223 F.Supp.2d 435, 441 (S.D.N.Y.2001) (quoting *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir.1995)) (citations and quotations omitted).

#### B. Excessive Force

One of the two principal claims contained within plaintiff's complaint stems from his assertion that on December 18, 2009, he was subjected to an unprovoked attack by defendants Winston and Gettmann and that, as a result, he suffered physical injuries. In their motion, defendants contend that plaintiff has failed to allege facts sufficient to state a claim for excessive use of force.

Plaintiff's excessive force claim must be analyzed under the Eighth Amendment, which proscribes punishments that involve the "unnecessary and wanton infliction of pain" and are incompatible with "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102, 104, 97 S.Ct. 285, 290, 291 (1976); *see also Whitley v. Albers*,

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[475 U.S. 312, 319, 106 S.Ct. 1076, 1084 \(1986\)](#) (citing, *inter alia, Estelle* ). While the Eighth Amendment does not mandate comfortable prisons, neither does it tolerate inhumane treatment of those in confinement; thus, the conditions of an **inmate**'s confinement are subject to Eighth Amendment scrutiny. [Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 1976 \(1994\)](#) (citing [Rhodes v. Chapman, 452 U.S. 337, 349, 101 S.Ct. 2392, 2400 \(1981\)](#)).

A plaintiff's constitutional right against cruel and unusual punishment is violated by an "unnecessary and wanton infliction of pain." [Whitley, 475 U.S. at 319, 106 S.Ct. at 1084](#) (citations and quotations omitted); [Griffen v. Crippen, 193 F.3d 89, 91 \(2d Cir.1999\)](#). The lynchpin inquiry in deciding claims of excessive force against prison officials is "whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." [Hudson v.. McMillian, 503 U.S. 1, 6-7, 112 S.Ct. 995, 998-999 \(1992\)](#) (applying *Whitley* to all excessive force claims); [Whitley, 475 U.S. at 320-21, 106 S.Ct. at 1085](#) (quoting [Johnson v. Glick, 481 F.2d 1028, 1033 \(2d Cir.\)](#) (Friendly, J.), cert. denied sub nom., [John v. Johnson, 414 U.S. 1033, 94 S.Ct. 462 \(1973\)](#)).

\*4 Analysis of claims of cruel and unusual punishment requires both objective examination of the conduct's effect and a subjective inquiry into the defendant's motive for his or her conduct. [Wright v. Goord, 554 F.3d 255, 268 \(2d Cir.2009\)](#) (citing [Hudson, 503 U.S. at 7-8, 112 S.Ct. at 999](#) and [Blyden v. Mancusi, 186 F.3d 252, 262 \(2d Cir.1999\)](#)). As was recently emphasized by the United States Supreme Court in *Wilkins v. Gaddy*, however, after *Hudson* the "core judicial inquiry" is focused not upon the extent of the injury sustained, but instead whether the nature of the force applied was nontrivial. [--- U.S. ----, 130 S.Ct. 1175, 1179 \(2010\)](#) (per curiam). Accordingly, when considering the subjective element of the governing Eighth Amendment test a court must be mindful that the absence of serious injury, though relevant, does not necessarily negate a finding of wantonness since, as the Supreme Court has noted,

[w]hen prison officials maliciously and sadistically use

force to cause harm, contemporary standards of decency always are violated .... This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.

[Hudson, 503 U.S. at 9, 112 S.Ct. at 1000](#) (citations omitted); [Velasquez v. O'Keefe, 899 F.Supp. 972, 973 \(N.D.N.Y.1995\)](#) ( [McAvoy, C.J.](#) ) (quoting [Hudson, 503 U.S. at 9, 112 S.Ct. at 1000](#)); *see Romaine v. Rewson, 140 F.Supp.2d 204, 211 (N.D.N.Y.2001)* (Kahn, J.). Even a *de minimis* use of physical force can constitute cruel and unusual punishment if it is "repugnant to the conscience of mankind." [Hudson, 503 U.S. at 9-10, 112 S.Ct. 1000](#) (citations omitted).

With its focus on the harm done, the objective prong of the inquiry is contextual and relies upon "contemporary standards of decency." [Wright, 554 F.3d at 268](#) (quoting [Hudson, 503 U.S. at 8, 112 S.Ct. at 1000](#)) (internal quotations omitted)). When addressing this component of an excessive force claim under the Eighth Amendment calculus, the court can consider the extent of the injury suffered by the **inmate** plaintiff. While the absence of significant injury is certainly relevant, it is not dispositive. [Hudson, 503 U.S. at 7, 112 S.Ct. at 999](#). The extent of an **inmate**'s injury is but one of the factors to be considered in determining a prison official's use of force was "unnecessary and wanton"; courts should also consider the need for force, whether the force was proportionate to the need, the threat reasonably perceived by the officials, and what, if anything, the officials did to limit their use of force. [Whitley, 475 U.S. at 321, 106 S.Ct. at 1085](#) (citing [Johnson, 481 F.2d at 1033](#)). "But when prison officials use force to cause harm maliciously and sadistically, 'contemporary standards of decency are always violated .... This is true whether or not significant injury is evident.' " [FN6 Wright, 554 F.3d at 268-69](#) (quoting [Hudson, 503 U.S. at 9, 112 S.Ct. at 1000](#)).

[FN6.](#) That is not to say, however, that "every malevolent touch by a prison guard gives rise to a federal cause of action." [Griffen, 193 F.3d at 91](#) (citing [Romano v. Howarth, 998 F.2d 101, 105 \(2d Cir.1993\)](#)); *see also Johnson, 481 F.2d*

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at 1033 (“Not every push or shove, even if it later may seem unnecessary in the peace of a judge's chambers, violates a **prisoner's** constitutional rights”).

\*5 Addressing the objective prong of the Eighth Amendment analysis, liberally construing the complaint, the fact that it appears that Caldwell suffered at least minor injuries from the use of force distinguishes this case from others in which the lack of injury has justified summary dismissal of excessive force claims alleged under the Eighth Amendment. *See, e.g., Boddie v. Schnieder, 105 F.3d 857, 862 (2d Cir.1997)* (the fact that the plaintiff, who claims he was “bumped, grabbed, elbowed, and pushed” by the defendants did not rise to a level of constitutional significance since plaintiff did “not maintain that he experienced any pain or injury as a result of the physical contact”); *Cunningham v. Rodriguez, No. 01 Civ. 1123, 2002 WL 31654960, at \*5 (S.D.N.Y. Nov. 22, 2002)*.<sup>FN7</sup> Although the precise nature of the injuries that plaintiff sustained is not disclosed in the complaint, plaintiff does allege that he was bleeding as a result of the assault and also that he has suffered substantial periods of pain in his neck and sharp pain in his hands. Under the circumstances now presented it would be inappropriate to find, objectively, that plaintiff has failed to alleges injuries sufficiently serious to rise to a constitutionally cognizable level.

FN7. Copies of all unreported decisions cited in this document have been appended for the convenience of the *pro se* plaintiff.\*

\* Editor's Note: Attachments of Westlaw case copies deleted for online display.

Turning to the subjective element, again broadly construed, plaintiff's complaint has alleged sufficient facts to suggest that the attack was unprovoked. In this regard, plaintiff alleges that he was being escorted to a cell and taunted by defendants Winston and Gettmann. While the complaint also suggests that Caldwell verbally responded to their teasing and apparently did not immediately turn around when directed to do so, when read liberally the facts alleged also support an inference that no use of force was necessary to ensure plaintiff's compliance, but that

defendants nonetheless hurled him against the wall as a result of his verbal response.

In view of the facts alleged and the deference owed to him as a *pro se* litigant, I find plaintiff's complaint facially sufficient insofar as his excessive force claim is concerned, and that at this early juncture it would premature to dismiss that claim as not stating a plausible cause of action. Accordingly, I recommend that defendants' motion to dismiss plaintiff's excessive use of force claim be denied.<sup>FN8</sup>

FN8. Embedded within plaintiff's complaint are potential claims against the corrections officer defendants for failure to protect the plaintiff from the actions of fellow officers. A corrections worker who, while not participating in an assault upon an **inmate**, is present while it occurs may nonetheless bear responsibility for any resulting constitutional deprivation. *See Anderson v. Branen, 17 F.3d 552, 557 (2d Cir.1994)*. It is well-established that a law enforcement official has an affirmative duty to intervene on behalf of an individual whose constitutional rights are being violated in his presence by other officers. *See Mowry v. Noone, No. 02-CV-6257 Fe, 2004 WL 2202645, at \*4 (W.D.N.Y. Sept. 30, 2004); see also Curley v. Village of Suffern, 268 F.3d 65, 72 (2d Cir.2001)* (“Failure to intercede results in [section 1983] liability where an officer observes excessive force being used or has reason to know that it will be.”) (citations omitted).

#### B. Medical Indifference

The second component of plaintiff's complaint alleges that defendant Stout, a prison nurse, failed to provide him with needed medical treatment. Plaintiff's claim against Nurse Stout apparently stems from her failure, upon examining Caldwell immediately following the December 18, 2009 incident, to provide him with any medical attention. Though plaintiff admits in his complaint that defendant Stout responded to his calls for emergency medical attention, he apparently maintains that after arriving at his cell she refused to render medical treatment.

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In support of dismissal of this claim, defendants argue that plaintiff's allegations of negligence are insufficient as a matter of law, and he has failed to allege sufficient facts to demonstrate that he was denied the medical care mandated under the Eighth Amendment.<sup>FN9</sup>

FN9. Defendants are correct in the assertion that allegations of negligence cannot support a claim under section 1983. Salim v. Proulx, 93 F.3d 86, 92 (2d Cir.1996). Thus, to the extent that plaintiff's complaint include claims of negligence, I will recommend dismissal of such claims.

\*6 Claims that prison officials have intentionally disregarded an **inmate's** medical needs fall under the umbrella of protection from the imposition of cruel and unusual punishment afforded by the Eighth Amendment. Estelle, 429 U.S. at 102, 104, 97 S.Ct. at 290, 291. To satisfy their obligations under that Constitutional provision, prison officials must "ensure that **inmates** receive adequate food, shelter, and medical care, and must take reasonable measures to guarantee the safety of **inmates**." Farmer, 511 U.S. at 832, 114 S.Ct. at 1976 (quoting Hudson, 468 U.S. at 526-27, 104 S.Ct. at 3200) (internal quotations omitted). As was previously discussed, a claim alleging that prison officials have violated the Eighth Amendment by inflicting cruel and unusual punishment must satisfy both objective and subjective requirements. Wright, 554 F.3d at 268; Price v. Reilly, No. 07-CV-2634 (JFB/ARL), 2010 WL 889787, at \*7-8 (E.D.N.Y. Mar. 8, 2010). Addressing the objective element, to prevail a plaintiff must demonstrate a violation sufficiently serious by objective terms, "in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists." Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir.1996). With respect to the subjective element, a plaintiff must also demonstrate that the defendant had "the necessary level of culpability, shown by actions characterized by 'wantonness.'" Blyden, 186 F.3d at 262. Claims of medical indifference are thus subject to analysis utilizing this Eighth Amendment paradigm. See Salahuddin v. Goord, 467 F.3d 263, 279-81 (2d Cir.2006).

#### 1. Objective Requirement

Analysis of the objective, "sufficiently serious" requirement of an Eighth Amendment medical indifference claim begins with an inquiry into "whether the **prisoner** was actually deprived of adequate medical care ...", and centers upon whether prison officials acted reasonably in treating the plaintiff. Salahuddin, 467 F.3d at 279. A second prong of the objective test addresses whether the inadequacy in medical treatment was sufficiently serious. Id. at 280. If there is a complete failure to provide treatment, the court must look to the seriousness of the **inmate's** medical condition. Smith v. Carpenter, 316 F.3d 178, 185-86 (2d Cir.2003). If, on the other hand, the complaint alleges that treatment was provided but was inadequate, the seriousness inquiry is more narrowly confined to that alleged inadequacy, rather than focusing upon the seriousness of the **prisoner's** medical condition. Salahuddin, 467 F.3d at 280. "For example, if the **prisoner** is receiving on-going treatment and the offending conduct is an unreasonable delay or interruption in treatment ... [the focus of] the inquiry is on the challenged delay or interruption, rather than the **prisoner's** underlying medical condition alone." Id. (quoting Smith, 316 F.3d at 185) (internal quotations omitted). In other words, at the heart of the relevant inquiry is the seriousness of the medical need, and whether from an objective viewpoint the temporary deprivation was sufficiently harmful to establish a constitutional violation. Smith, 316 F.3d at 186. Of course, "when medical treatment is denied for a prolonged period of time, or when a degenerative medical condition is neglected over sufficient time, the alleged deprivation of care can no longer be characterized as 'delayed treatment, but may properly be viewed as a 'refusal' to provide medical treatment." Id. at 186, n. 10 (quoting Harrison v. Barkley, 219 F.3d 132, 137 (2d Cir.2000)).

\*7 Since medical conditions vary in severity, a decision to leave a condition untreated may or may not raise constitutional concerns, depending on the circumstances. Harrison, 219 F.3d at 136-37 (quoting, *inter alia*, Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir.1998)). Relevant factors informing this determination include whether the plaintiff suffers from an injury or condition that a " 'reasonable doctor or patient would find important and worthy of comment or treatment' ", a condition that " 'significantly affects' " a **prisoner's** daily activities, or " 'the existence of chronic and substantial

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pain.’ “ [Chance, 143 F.3d at 702](#) (citation omitted); [Lafave v. Clinton County, No. CIV. 9:00CV774, 2002 WL 31309244, at \\*3](#) (N.D.N.Y. Apr. 3, 2002) (Sharpe, M.J.) (citation omitted).

In the first instance, it is unclear whether plaintiff is alleging that he was completely denied medical treatment. Although it appears to be plaintiff's claim that Nurse Stout denied him medical treatment, he also alleges that “within minutes” after Nurse Stout left his cell, a sergeant appeared and took him to a holding cell where his injuries were photographed. It may well be that Caldwell's injuries were treated at that time and that treatment of his injuries, by plaintiff's own account, was delayed only by a few minutes. Additionally, as was noted above, plaintiff's complaint fails to reveal the nature and extent of his injuries. Instead, plaintiff merely alleges that he has periodically suffered substantial pain in his hands and in his neck; there are no allegations of fact in the complaint that suggest that plaintiff's condition was one of urgency or that the apparently delayed medical treatment exposed plaintiff to death, degeneration, or extreme pain.

For these reasons, I have concluded that plaintiff's complaint fails to allege sufficient facts to satisfy the objective prong of the medical indifference inquiry.

## 2. Subjective Element

The second, subjective, requirement for establishing an Eighth Amendment medical indifference claim mandates a showing of a sufficiently culpable state of mind, or deliberate indifference, on the part of one or more of the defendants. [Salahuddin, 467 F.3d at 280](#) (citing [Wilson, 501 U.S. at 300, 111 S.Ct. 2321](#)). Deliberate indifference, in a constitutional sense, exists if an official “knows of and disregards an excessive risk to **inmate** health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [or she] must also draw the inference.” [Farmer, 511 U.S. at 837, 114 S.Ct. at 1979](#); [Leach v. Dufrain, 103 F.Supp.2d 542, 546 \(N.D.N.Y.2000\)](#) (Kahn, J.) (citing [Farmer, 511 U.S. at 837, 114 S.Ct. at 1979](#)); [Waldo v. Goord, No. 97-CV-1385, 1998 WL 713809, at \\*2](#) (N.D.N.Y. Oct. 1, 1998) (Kahn, J. and Homer, M.J.) (same). Deliberate

indifference is a mental state equivalent to subjective recklessness as the term is used in criminal law. [Salahuddin, 467 F.3d at 280](#) (citing [Farmer, 511 U.S. at 839-40, 114 S.Ct.1970](#)).

\*8 As defendants correctly point out, mere negligence on the part of a physician or other prison medical official in treating or failing to treat a **prisoner's** medical condition, on the other hand, does not implicate the Eighth Amendment and is not properly the subject of a [§ 1983](#) action. [Estelle, 429 U.S. at 105-06, 97 S.Ct. at 292](#); [Chance, 143 F.3d at 703](#). “Medical malpractice does not become a constitutional violation merely because the victim is a **prisoner**.” [Estelle, 429 U.S. at 106, 97 S.Ct. at 292](#). Thus, for example, a physician who “delay[s] ... treatment based on a bad diagnosis or erroneous calculus of risks and costs” does not exhibit the mental state necessary for deliberate indifference. [Harrison, 219 F.3d at 139](#). If prison officials consciously delay or otherwise fail to treat an **inmate's** serious medical condition “as punishment or for other invalid reasons,” however, such conduct is actionable as deliberate indifference. [Harrison, 219 F.3d at 138](#); [Kearsey v. Williams, 2005 WL 2125874, at \\*5](#) (S.D.N.Y. Sep. 1, 2005).

The allegations in plaintiff's complaint fail to suggest that Nurse Stout acted with the requisite subjective intent. Once again, there is nothing in the complaint to suggest that plaintiff's condition was dire and presented a substantial risk of harm to his well-being if not immediately treated. Accordingly, the complaint is devoid of any factual allegations that would suggest that Nurse Stout was aware of facts from which it could be inferred that plaintiff's health was at serious risk, that she drew that inference, and consciously disregarded it.

Because plaintiff's complaint **fails** to allege facts to establish satisfy either the objective or **subjective prongs** of the Eighth Amendment deliberate indifference standard, it **fails** to establish a plausible Eighth Amendment violation based upon the alleged lack of medical treatment for plaintiff's injuries. Accordingly, I recommend dismissal of plaintiff's **medical indifference** claims and dismissal of all claims as against defendant J. Stout.

## C. Leave to Amend

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Ordinarily, a court should not dismiss a complaint filed by a *pro se* litigant without granting leave to amend at least once if there is any indication that a valid claim might be stated. *Branum v. Clark*, 927 F.2d 698, 704-05 (2d Cir.1991) (emphasis added); *see also Fed.R.Civ.P. 15(a)* (leave to amend “shall be freely given when justice so requires”); *see also Mathon v. Marine Midland Bank, N.A.*, 875 F.Supp. 986, 1003 (E.D.N.Y.1995) (leave to replead granted where court could not say that under no circumstances would proposed claims provide a basis for relief).

Based upon what little is now known regarding the relevant occurrences, it seems doubtful that plaintiff will be able to state a viable Eighth Amendment claim for medical indifference.<sup>FN10</sup> At this stage of the proceeding, however, the court cannot conclude as a matter of law that no valid claim can be stated. Thus, in light of plaintiff's *pro se* status and the deference to which he is entitled, I find that plaintiff should be afforded an opportunity to amend his complaint in an attempt to cure the deficiencies associated with his medical indifference cause of action.

<sup>FN10.</sup> It is well established that minor injuries do not normally rise to the level of seriousness required to make a viable claim medical indifference under the Eighth Amendment. *See, e.g., Harris v. Morton*, No. 9:05-CV-1049, 2008 WL 596891, at \*3 n. 2 (N.D. N.Y. Feb. 29, 2008) (Kahn, J. and Treen, M.J.) (“We note that although Plaintiff states he suffered from a ‘snapped’ neck, he does not indicate he suffered from anything other than a generic neck injury.”) (citing *Bennett v. Hunter*, No. 9:02-CV-1365, 2006 WL 1174309) (Scullin, S.J. and Lowe, M.J.) (pinched nerve not a serious medical need)); *Ford v. Phillips*, No. 05 Civ. 6646, 2007 WL 946703, at \* 12 (S.D.N.Y. Mar. 27, 2007) (abrasions, minor bruise, slight bleeding and scratches are not sufficiently serious); *Dzwonczyk v. Syracuse Police Dep’t*, No. 5:08-CV-00557, 2008 WL 5459147, at \* 13 (N.D.N.Y. Dec. 22, 2008) (McCurn, S.J.) (allegation of a bruised rib does not satisfy the requirement of a sufficiently serious deprivation); and, *Jones v. Furman*, No. 02-CV-939F, 2007 WL 894218, at \*10

(W.D.N.Y. Mar. 21, 2007) (soreness, pain in and a lump behind his right ear, lump on the back of his head, small abrasions on his nose and knuckle, and bruising to his back, ribs do not constitute the requisite serious medical need) (citing *Hemmings v. Gorczyk*, 134 F.3d 104, 109 (2d Cir.1998)).

#### IV. SUMMARY AND RECOMMENDATION

\*9 Having carefully considered defendants' motion along with plaintiff's opposition, I find that plaintiff has sufficiently stated a plausible claim for use of excessive force, but that his pleading is fatally insufficient with regard to his claim for medical indifference and that it seems unlikely that plaintiff ultimately will be able to allege a constitutional claim. Nonetheless, in view of the formative stage of the proceedings and the deference that must be afforded plaintiff as a *pro se* litigant, I recommend that plaintiff's medical indifference claim be dismissed, with leave to replead. As to plaintiff's claims of negligence, which are not cognizable under section 1983, those claims should be finally dismissed from this lawsuit.

Accordingly, it is hereby respectfully

RECOMMENDED that defendants' motion to dismiss (Dkt. No. 17) be GRANTED, in part, and that plaintiff's claims for negligence be DISMISSED with prejudice, and that plaintiff's claims for medical indifference, including all claims against defendant J. Stout, be DISMISSED with leave to replead; and it is further

RECOMMENDED that defendants' motion to dismiss otherwise be DENIED.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections must be filed with the clerk of the court within FOURTEEN days of service of this report. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 6(a), 6(d), 72; Roldan v. Racette, 984 F.2d 85 (2d Cir.1993).

It is hereby ORDERED that the clerk of the court serve a copy of this report and recommendation upon the

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parties in accordance with this court's local rules.

N.D.N.Y.,2010.

Caldwell v. Winston

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Only the Westlaw citation is currently available.  
**This decision was reviewed by West editorial staff and not assigned editorial enhancements.**

United States District Court,

N.D. New York.

Cory CALDWELL, Plaintiff,

v.

GETTMANN, Corrections Officer; J. Stout, Medical Nurse; and Winston, Correctional Officer, Upstate Correctional Facility, formerly known as John Doe, Defendants.

No. 9:09-CV-580.

Aug. 27, 2010.

Cory Caldwell, Malone, NY, pro se.

Hon. [Andrew M. Cuomo](#), Attorney General of the State of New York, [Adrienne J. Kerwin, Esq.](#), Asst. Attorney General, Albany, NY, for Defendants.

***DECISION and ORDER***

**DAVID N. HURD**, District Judge.

\*1 Plaintiff, Cory Caldwell, commenced this civil rights action in May 2009, pursuant to [42 U.S.C. § 1983](#). By Report-Recommendation dated July 23, 2010, the Honorable David E. Peebles, United States Magistrate Judge, recommended that defendants' motion to dismiss (Docket No. 17) be granted, in part, and that plaintiff's claims for negligence be dismissed with prejudice, and that plaintiff's claims for medical indifference, including all claims against defendant J. Stout, be dismissed with leave to replead; and further recommended that defendants' motion to dismiss otherwise be denied. No objections to the Report-Recommendation have been filed.

Based upon a careful review of the file, and the recommendations of Magistrate Judge Peebles, the Report-Recommendation is accepted and adopted in all respects. *See 28 U.S.C. 636(b)(1).*

Accordingly, it is

ORDERED that

1. Defendants' motion to dismiss (Docket No. 17) is GRANTED, in part;
2. Plaintiff's claims for negligence are DISMISSED with prejudice;
3. Plaintiff's claims for medical indifference, including all claims against defendant J. Stout, are DISMISSED with leave to replead;
4. Defendants' motion to dismiss otherwise is DENIED;
5. The file is returned to the Magistrate Judge for any further proceedings.

IT IS SO ORDERED.

N.D.N.Y., 2010.

Caldwell v. Gettmann  
Slip Copy, 2010 WL 3430036 (N.D.N.Y.)  
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LEXSEE 1995 U.S.DIST. LEXIS 7136

MINA POURZANDVAKIL, Plaintiff, -against- HUBERT HUMPHRY, JUDISICIAL SYSTEM OF THE STATE OF MINNESOTA AND OLMESTED COUNTY COURT SYSTEM, AND STATE OF MINNESOTA, SAINT PETER STATE HOSPITAL, DOCTOR GAMMEL STEPHELTON, ET AL ERICKSON, NORTH WEST BANK AND TRUST, OLMESTED COUNTY SOCIAL SERVICE, J.C. PENNY INSURANCE, METMORE FINICIAL, TRAVELER INSURANCE, COMMERCIAL UNION INSURANCE, HIRMAN INSURANCE, AMERICAN STATE INSURANCE, FARMERS INSURANCE, C. O BROWN INSURANCE, MSI INSURANCE, STEVEN YOUNGQUIST, KENT CHIRSTAIN, MICHAEL BENSON, UNITED AIRLINE, KOWATE AIRLINE, FORDMOTOR CRIDITE, FIRST BANK ROCHESTER, GEORGE RESTWICH, BRITISH AIRWAYS, WESTERN UNION, PRUDENTIAL INSURANCE, T.C.F. BANK, JUDGE SANDY KIETH, JUDGE NIERGARI, OLMESTED COUNTY JUDGING, JUDGE MORES, JUDGE JACOBSON, JUDGE CHALLIEN, JUDGE COLLIN, JUDGE THOMASE, JUDGE BUTTLER, JUDGE MORKE, JUDGE MOWEER, SERA CLAYTON, SUSAN MUDHAUL, RAY SCHMIDT, Defendants.<sup>1</sup>

1 Names in the caption are spelled to reflect plaintiffs complaint.

Civil Action No. 94-CV-1594

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

1995 U.S. Dist. LEXIS 7136

May 22, 1995, Decided  
May 23, 1995, FILED

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff filed a complaint accusing defendants with kidnapping plaintiff and her daughter, torturing plaintiff in the Mayo Clinic, and causing plaintiff and her daughter to suffer physically, financially, and emotionally. Certain defendants sought vacation of the defaults entered against them without proper service, some sought dismissal of the complaint, and some sought both vacation of the defaults and dismissal.

**OVERVIEW:** Plaintiff served defendants by certified mail. The court determined that such service was not authorized under federal law or under either New York or Minnesota law. Additionally, plaintiff's extraterritorial service of process was not effective under *Fed. R. Civ. P.*

4(k). Defendants were not subject to federal interpleader jurisdiction, and they were not joined pursuant to *Fed. R. Civ. P. 14* or *Fed. R. Civ. P. 19*. No federal long-arm statute was argued as a basis for jurisdiction, and the alleged harm did not stem from acts in New York for jurisdiction under *N.Y. C.P.L.R. § 302(a)*. The complaint showed no basis for subject matter jurisdiction against defendants that were insurance companies with no apparent relationship to claims of rape, torture, harassment, and kidnapping, and the court found that no basis for supplemental jurisdiction under *28 U.S.C.S. § 1337(a)* existed. Venue was clearly improper under *28 U.S.C.S. § 1331(b)* because no defendant resided in the district and none of the conduct complained of occurred there. Plaintiff's claims of civil rights violations were insufficient because her complaint was a litany of general conclusions, not specific allegations of fact.

**OUTCOME:** The court vacated all defaults. The court dismissed plaintiff's complaint against all moving and non-moving defendants. The dismissal of the complaint against certain defendants premised on the court's lack of power either over the person of the defendant or the subject matter of the controversy was without prejudice, but dismissals against the remaining defendants were with prejudice. Requests for sanctions and attorney's fees were denied.

#### LexisNexis(R) Headnotes

*Civil Procedure > Pleading & Practice > Service of Process > Methods > Residential Service*

*Civil Procedure > Pleading & Practice > Service of Process > Methods > Service Upon Agents*

*Governments > Federal Government > Employees & Officials*

[HN1] Under the Federal Rules of Civil Procedure, service on an individual may be made by (1) delivery to the named defendant; or (2) delivery to a person of suitable age and discretion at the defendant's dwelling house or usual place of abode; or (3) delivery to an agent authorized by law or by the defendant to receive service of process. *Fed. R. Civ. P. 4(e)(2)*. Service on an individual also can be accomplished through a method authorized by the state in which the district court sits or in which the individual is located. *Fed. R. Civ. P. 4(e)(1)*.

*Business & Corporate Law > Agency Relationships > Agents Distinguished > General Overview*

*Civil Procedure > Pleading & Practice > Service of Process > Methods > Mail*

*Civil Procedure > Pleading & Practice > Service of Process > Methods > Service Upon Corporations*

[HN2] Service on a corporation may be accomplished in a judicial district of the United States (1) pursuant to a method authorized by the law of the state in which the court sits or in which the corporation is located; or (2) by delivering a copy of the summons and complaint to an officer, managing or general agent, or to any other agent authorized by statute to receive service and, if the statute so requires, by also mailing a copy to the defendant. *Fed. R. Civ. P. 4(h)(1), 4(e)(1)*.

*Civil Procedure > Pleading & Practice > Service of Process > Methods > General Overview*

[HN3] Neither New York nor Minnesota law authorizes personal service on an individual or corporation by certified mail. *N.Y. C.P.L.R. §§ 308, 311* (Supp. 1995); *N.Y. Bus. Corp. Law § 306* (Supp. 1995); *Minn. Stat. § 543.08* (1995); *Minn. R. 4.03* (1995).

*Civil Procedure > Pleading & Practice > Service of Process > Methods > Mail*

*Civil Procedure > Pleading & Practice > Service of Process > Time Limitations > General Overview*

*Governments > Local Governments > Claims By & Against*

[HN4] Service on states, municipal corporations, or other governmental organizations subject to suit can be effected by (1) delivering a copy of the summons and complaint to the state's chief executive officer; or (2) pursuant to the law of the state in which the defendant is located. *Fed. R. Civ. P. 4(j)(2)*. Minnesota law does not authorize service on a governmental entity by certified mail. *Minn. R. 4.03(d), (e) (1995)*.

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview*

*Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview*

*Civil Procedure > Parties > Interpleaders > General Overview*

[HN5] A plaintiff's extraterritorial service of process in New York can be effective only under any of the following circumstances: (1) if defendants could be subjected to the jurisdiction of a court of general jurisdiction in New York state; (2) if the defendant is subject to federal interpleader jurisdiction; (3) if the defendant is joined pursuant to *Fed. R. Civ. P. 14* or *Fed. R. Civ. P. 19* and is served within a judicial district of the United States and not more than 100 miles from the place from which the summons issues; (4) if a federal statute provides for long-arm jurisdiction; or (5) if plaintiff's claims arise under federal law and the defendants could not be subject to jurisdiction in the courts of general jurisdiction in any state of the United States. *Fed. R. Civ. P. 4(k)*.

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview*

*Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview*

[HN6] *N.Y. C.P.L.R. § 302(a)* provides that in order to obtain jurisdiction over a non-domiciliary, the plaintiff must show both certain minimal contacts between the defendant and the state such as transacting any business in the state and that the harm plaintiff suffered springs from the act or presence constituting the requisite contact.

*Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General*

**Overview****Civil Procedure > Jurisdiction > Subject Matter****Jurisdiction > Supplemental Jurisdiction > Pendent Claims****Civil Procedure > Jurisdiction > Subject Matter****Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy**

[HN7] 28 U.S.C.S. § 1367(a) requires a relationship between the state and federal claims for pendent jurisdiction so that they form part of the same case or controversy.

**Civil Procedure > Jurisdiction > Diversity Jurisdiction****> Citizenship > General Overview****Civil Procedure > Venue > Multiparty Litigation**

[HN8] See 28 U.S.C.S. § 1391(a).

**Civil Procedure > Jurisdiction > Subject Matter****Jurisdiction > Federal Questions > General Overview****Civil Procedure > Venue > Multiparty Litigation**

[HN9] See 28 U.S.C.S. § 1391(l).

**Civil Procedure > Venue > Federal Venue Transfers > Improper Venue Transfers****Civil Procedure > Venue > Individual Defendants****Civil Procedure > Venue > Multiparty Litigation**

[HN10] Where venue is laid in the wrong district, the court shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought. 28 U.S.C.S. § 1406(a).

**Civil Procedure > Venue > Motions to Transfer > General Overview****Civil Procedure > Judicial Officers > Judges > Discretion****Governments > Legislation > Statutes of Limitations > General Overview**

[HN11] The purpose of the court's discretionary authority to transfer rather than dismiss in cases of improperly laid venue is to eliminate impediments to the timely disposition of cases and controversies on their merits.

**Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims****Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss**

[HN12] Where a court has already dismissed against the moving parties on jurisdictional grounds, it has no power to address a Fed. R. Civ. P. 12(b)(6) issue.

**Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims****Civil Rights Law > General Overview**

[HN13] Complaints that rely on civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights instead of a litany of general conclusions that shock but have no meaning.

**Civil Procedure > Parties > Self-Representation > Pleading Standards**

[HN14] A pro se plaintiff's complaint must be construed liberally and should be dismissed only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

**Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims****Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview****Civil Procedure > Parties > Self-Representation > Pleading Standards**

[HN15] Even pro se complaints must show some minimum level of factual support for their claims.

**Civil Procedure > Parties > Self-Representation > General Overview****Civil Procedure > Counsel > Appointments****Civil Rights Law > Prisoner Rights > Prison Litigation Reform Act > Claim Dismissals**

[HN16] The United States Supreme Court explicitly has acknowledged a district court's power under 28 U.S.C.S. § 1915(d) to dismiss as frivolous a complaint that lacks an arguable basis either in law or in fact. The Supreme Court has explicitly declined to rule, however, on whether a district court has the authority to dismiss sua sponte frivolous complaints filed by non-indigent plaintiffs. The law in the district of New York is that a district court may sua sponte dismiss a frivolous complaint even if the plaintiff has paid the filing fee.

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**JUDGES:** ROSEMARY S. POOLER, UNITED STATES DISTRICT JUDGE

**OPINION BY:** ROSEMARY S. POOLER

## OPINION

### **MEMORANDUM-DECISION AND ORDER**

#### **INTRODUCTION**

In the four and one-half months since she filed this action, plaintiff Mina Pourzandvakil has filed three

amended complaints and ten motions. She also has sought and received [\*3] entry of default against ten defendants, none of whom she properly served. She twice has sought and been denied temporary restraining orders. She has included in her action defendants with no apparent connection to this forum, that were vindicated in actions she brought in other forums.

In response, several individual defendants and groups of defendants have filed a total of twelve motions, some seeking vacation of the defaults entered against them, some seeking dismissal and others seeking both. We grant defendants' motions insofar as they seek vacation of the clerk's entries of default and dismissal of the complaint. We vacate *sua sponte* the entries of default against the non-moving defendants. Finally, we dismiss the complaint in its entirety against all defendants.

## BACKGROUND

Pourzandvakil commenced this action by filing a complaint in the Office of the Clerk on December 9, 1994 (Docket No. 1). The complaint named as defendants the Attorney General of the State of Minnesota, the State of Minnesota and Olmsted County, Minnesota judicial systems, various Minnesota judges and prosecutors, St. Peter State Hospital in Minnesota and various doctors who worked at St. Peter's. [\*4] Without specifying the time or defendant involved, the complaint accused the defendants of kidnapping Pourzandvakil and her daughter, torturing Pourzandvakil in the Mayo Clinic since April 1985, and causing Pourzandvakil and her daughter to suffer physically, financially and emotionally. Pourzandvakil twice requested that we issue a temporary restraining order. We denied both requests. *See* Order entered December 14, 1994 (Docket No. 4) and Memorandum-Decision and Order entered December 22, 1994 (Docket No. 6).

On December 27, 1994, Pourzandvakil filed an amended complaint (the "first amended complaint") (Docket No. 7) that appears to differ from the original complaint by adding British Airways as a defendant without making any allegations against British Airways. The first amended complaint also differs by requesting additional damages for prior cases and adding descriptions of several previous cases. Annexed to the first amended complaint is another document labeled amended complaint (the "annexed amended complaint") (Docket No. 7) whose factual allegations differ substantially from both the original complaint and the first amended complaint. The annexed amended complaint also [\*5] adds British Airways as a party but specifies only that Pourzandvakil has travelled on that airline and that British Airways, along with other airlines on which Pourzandvakil has travelled, is aware of all the crimes committed against her.

Pourzandvakil filed yet another amended complaint

on January 13, 1995 (the "second amended complaint") (Docket No. 11). The second amended complaint adds as defendants several banks, other financial institutions, insurance companies, insurance agents or brokers, attorneys and airlines as well as the Postmaster of Olmsted County and Western Union. The allegations against these defendants defy easy summarization and will be addressed only insofar as they are relevant to the various motions.

The Clerk of the Court has entered default against the following defendants: J.C. Penny Insurance (*sic*) <sup>2</sup> ("J.C. Penney"), British Airways, Kowate (*sic*) Airline ("Kuwait"), MSI Insurance (*sic*) ("MSI"), Judge Mork, Steven Youngquist ("Youngquist"), Prudncial Insurance (*sic*) ("Prudential"), Ford Motor Credit ("Ford"), First Bank Rochester, and TCF Bank ("TCF"). Based on the submissions Pourzandvakil made in support of her requests for entry of default, [\*6] it appears that she served these defendants by certified mail.

The court has received answers from the following defendants: Hubert H. Humphrey III, St. Peter Regional Treatment Center, and Drs. Gerald H. Gammell, William D. Erickson, and Thomas R. Stapleton (joint answer filed January 9, 1995); Olmsted County, Ray Schmitz ("Schmitz"), Susan Mundahl ("Mundahl"), C.O. Brown Agency, Inc. ("C.O. Brown") (answer to amended complaint filed January 23, 1995); George Restovich ("Restovich") (answer to complaint or amended complaint filed January 30, 1995); Norwest Corporation ("Norwest") (answer to amended complaint filed January 31, 1995, amended answer of Norwest Bank Minnesota, N.A. to amended complaint filed February 13, 1995); Travelers Insurance Company ("Travelers") (answer filed February 1, 1995); Michael Benson ("Benson") (answer filed February 6, 1995); Hirman Insurance ("Hirman") (answer filed February 6, 1995); Richard Maki ("Maki") (answer to complaint or amended complaint filed February 17, 1995); Western Union (answer filed February 21, 1995); Steven C. Youngquist ("Youngquist") (answer to complaint or amended complaint filed February 23, 1995); Kuwait (answer filed March [\*7] 6, 1995); J.C. Penney (answer filed March 22, 1995); Susan E. Cooper <sup>3</sup> (answer to amended complaint filed March 24, 1995); and Chief Judge Anne Simonett, Judge Jack Davies, Judge Roger Klaphke, Judge Dennis Challeen and Judge Lawrence Collins (joint answer filed April 3, 1995).

2 Plaintiff's spelling is idiosyncratic, and we preserve the spelling in its original form only where absolutely necessary for accuracy of the record. Otherwise we substitute the word we believe plaintiff intended for the word she actually wrote, e.g., "tortured" for "tureared."

The court has also received a total of ten motions from Pourzandvakil since February 27, 1995. She moved

for a default judgment against defendants J.C. Penney, First Bank Rochester, Prudential, Ford, MSI, British Airways, and TCF. She moved for immediate trial and "venue in a different place" against several defendants and also requested action according to law and criminal charges. Finally, she made motions opposing defendants' motions.

3 Susan E. Cooper is not named as a defendant in the original complaint or any amended complaint filed with this court. From correspondence with Cooper's attorney, it appears that plaintiff sent Cooper a copy of a different version of the complaint. Because the original of this version was not filed with the court, no action against Cooper is pending in this court.

[\*8] The court also has received a total of thirteen motions <sup>4</sup> from defendants. Several of the defendants moved for dismissal either under Rule 56 or *Rule 12 of the Federal Rules of Civil Procedure*. For instance, Commercial Union Insurance Companies ("Commercial") moved for dismissal of Pourzandvakil's complaint pursuant to *Fed. R. Civ. P. 12(b)* or, in the alternative, for a more definite statement. Commercial argued that Pourzandvakil's complaint against it is barred by *res judicata* and collateral estoppel and that this court does not have subject matter jurisdiction over the complaints against Commercial. American States Insurance Company ("ASI") moved for dismissal based on plaintiff's failure to state a claim upon which relief can be granted. ASI further moved for an order enjoining Pourzandvakil from further litigation against it. Maki moved for summary judgment based on lack of personal jurisdiction, improper venue, plaintiff's failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction. Hubert H. Humphrey, III, the Judicial System of the State of Minnesota, Judge James L. Mork, St. Peter Regional Treatment Center and Drs. Gammell, Erickson [\*9] and Stapleton (collectively, the "state defendants") moved for summary judgment alleging lack of personal jurisdiction, improper venue, plaintiff's failure to state a claim on which relief can be granted, lack of subject matter jurisdiction, sovereign immunity, and, on behalf of Judge Mork and the judicial system, absolute judicial immunity. The state defendants also requested costs and attorney's fees. Travelers moved for summary judgment based on *res judicata* and/or collateral estoppel, frivolity, lack of subject matter jurisdiction, and improper venue. Travelers sought a transfer of venue to Minnesota in the alternative. Hirman moved for summary judgment based on frivolity, lack of subject matter jurisdiction, and improper venue. Hirman also sought transfer of venue in the alternative. Olmsted County, Schmitz, Mundahl, C.O. Brown and Norwest sought dismissal based on lack of personal jurisdiction, improper venue, and plaintiff's failure to state a claim upon which relief can be granted. With respect to

Schmitz and Mundahl, defendants sought dismissal based on absolute prosecutorial immunity, and with respect to C.O. Brown, defendants sought dismissal on *res judicata* grounds. [\*10] Metmor Financial, Inc. ("Metmor") sought dismissal based on lack of personal jurisdiction, lack of subject matter jurisdiction, improper venue, and plaintiff's failure to state a claim upon which relief can be granted. Finally, Restovich moved for dismissal based on lack of personal jurisdiction.<sup>5</sup>

4 The court has also received three additional motions returnable May 22, 1995. The first -- from Judges Davies, Klaphake, Challeen, Collins and Chief Judge Simonett requests summary judgment dismissing the complaint based on lack of personal jurisdiction. The second by Western Union also requests summary judgment based, *inter alia*, on plaintiff's failure to state a claim on which relief can be granted. The third, by British Airways, also requests dismissal based, *inter alia*, on plaintiff's failure to state a claim on which relief can be granted. All three motions are mooted by this memorandum-decision and order which dismisses the complaint in its entirety against nonmoving defendants for failure to state a claim on which relief can be granted.

5 The court also received an affidavit and memorandum of law in support of summary judgment from J.C. Penney. However, the documents were not accompanied by a notice of motion.

[\*11] Four defendants, British Airways, Kuwait, Prudential, and Youngquist, sought vacatur of the defaults entered against them. Prudential coupled its request with a request for an order enjoining plaintiff from filing or intervening in any litigation against it. Youngquist also requested dismissal of the complaint based on lack of personal jurisdiction and lack of subject matter jurisdiction.

## ANALYSIS

### The Defaults

We vacate the defaults entered in this matter because plaintiff improperly served defendants. Each application for entry of default shows service by certified mail, which is not permitted by relevant federal, New York or Minnesota rules. [HN1] Under the Federal Rules of Civil Procedure, service on an individual may be made by (1) delivery to the named defendant; or (2) delivery to a person of suitable age and discretion at the defendant's dwelling house or usual place of abode; or (3) delivery to an agent authorized by law or by the defendant to receive service of process. *Fed. R. Civ. P. 4(e)(2)*. Service on an individual also can be accomplished through a method authorized by the state in which the district court sits or in which the individual is located. *Fed. R. Civ. P.*

4(e)(1). [HN2] Service on a corporation may be accomplished in a judicial district of the United States (1) pursuant to a method authorized by the law of the state in which the court sits or in which the corporation is located; or (2) by delivering a copy of the summons and complaint to an officer, managing or general agent, or to any other agent authorized by statute to receive service and, if the statute so requires, by also mailing a copy to the defendant. *Fed. R. Civ. P. 4(h)(1)* and 4(e)(1). [HN3] Neither New York nor Minnesota law authorizes personal service on an individual or corporation by certified mail. *See N.Y. Civ. Prac. L. & R. §§ 308, 311* (McKinney Supp. 1995); *N.Y. Bus. Corp. Law § 306* (McKinney Supp. 1995); *Minn. Stat. § 543.08* (1995); *Minn. R. 4.03* (1995). Finally, [HN4] service on states, municipal corporations or other governmental organizations subject to suit can be effected by (1) delivering a copy of the summons and complaint to the state's chief executive officer; or (2) pursuant to the law of the state in which the defendant is located. *Fed. R. Civ. P. 4(j)(2)*. Minnesota law does not authorize service on a governmental entity by certified mail. *See Minn. R. 4.03(d) and (e) (1995)*.

We therefore grant the motions by British Airways, Prudential, Kuwait, and Youngquist to vacate the defaults entered against them based both on the defective service and also on the meritorious defenses discussed below. We vacate *sua sponte* the entries of default against MSI, Ford, First Bank Rochester and TCF, all of whom were served improperly and preserved the service issue by raising it or declining to waive it. Concomitantly, we deny Pourzandvakil's motion for a default judgment against J.C. Penney, First Bank Rochester, Prudential, Ford, MSI, British Airways and TCF. We vacate *sua sponte* the entry of default against J.C. Penney, which preserved the issue of service in its answer. By moving to dismiss or for summary judgment without raising the issue of service, Judge Mork may have waived the service issue. However Judge Mork objected to personal jurisdiction as inconsistent with due process and otherwise presented meritorious defenses. We therefore treat his motion for summary judgment as including a motion to vacate the entry of default and accordingly grant it.

### II. The Jurisdictional Arguments

In addition to raising various [\*14] other grounds for dismissal, such as plaintiff's failure to state a claim on which relief can be granted and *res judicata*, most of the moving defendants urge (1) that this court lacks jurisdiction over either their persons or the subject matter of the controversy or (2) that this action is improperly venued. As we must, we examine jurisdiction and venue first.

#### A. Personal Jurisdiction

Maki, the state defendants, Olmsted County,

Schmitz, Mundahl, C.O. Brown, Norwest, Metmor, Restovich and Youngquist each allege that this court cannot exercise personal jurisdiction over them consistent with due process constraints. In support of their motions, these defendants present affidavits showing that they have had no significant contacts with the state of New York relevant to this lawsuit and that their contacts with Pourzandvakil all occurred in Minnesota. Nothing in plaintiff's voluminous submissions links any of these defendants with New York. [HN5] Plaintiff's extraterritorial service of process can be effective only under any of the following circumstances: (1) if defendants could be subjected to the jurisdiction of a court of general jurisdiction in New York State; (2) if the defendant [\*15] is subject to federal interpleader jurisdiction; (3) if the defendant is joined pursuant to *Rule 14 or Rule 19 of the Federal Rules of Civil Procedure* and is served within a judicial district of the United States and not more than 100 miles from the place from which the summons issues; (4) if a federal statute provides for long-arm jurisdiction; or (5) if plaintiff's claims arise under federal law and the defendants could not be subject to jurisdiction in the courts of general jurisdiction in any state of the United States. *Fed. R. Civ. P. 4(k)*. Defendants are not subject to federal interpleader jurisdiction and they were not joined pursuant to *Rule 14 or Rule 19*. In addition, no federal long-arm statute is argued as a basis for jurisdiction, and the moving defendants all would be subject to jurisdiction in Minnesota. Therefore, we must look to New York's long-arm statute to determine whether plaintiff's extraterritorial service of process could be effective under the one ground remaining pursuant to *Rule 4(k)*. *See N.Y. Civ. Prac. L. & R. § 302* (McKinney Supp. 1995). [HN6] This rule provides that in order to obtain jurisdiction over a non-domiciliary, the plaintiff must show both certain [\*16] minimal contacts between the defendant and the state (such as transacting any business in the state) and that the harm plaintiff suffered springs from the act or presence constituting the requisite contact. *Id. § 302(a)*. The moving defendants have demonstrated that plaintiff does not claim harm stemming from acts or contacts within the purview of *Section 302(a)*. Therefore, we grant these defendants' motions to dismiss the complaint for lack of personal jurisdiction.

## B. Subject Matter Jurisdiction

Pourzandvakil's complaint does not contain the jurisdictional allegations required by *Fed. R. Civ. P. 8(a)(1)*. Several defendants move for dismissal based either on this pleading defect or on an affirmative claim that no subject matter jurisdiction exists. Commercial, Travelers and Hirman (collectively, the "moving insurance companies") moved for dismissal because plaintiff has not pled the complete diversity of citizenship required for subject matter jurisdiction. The

state defendants, relying on *District of Columbia Court of Appeals v. Feldman*, argue that we lack subject matter jurisdiction over any issue that was determined in a state court proceeding to which plaintiff [\*17] was a party. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). These issues include plaintiff's hospitalization at St. Peter Regional Treatment Center. Finally, Metmor also moved for dismissal based on lack of subject matter jurisdiction because plaintiff has failed to plead a jurisdictional basis.

The moving insurance companies note correctly that insofar as the claims against them can be deciphered, plaintiff states that Traveler's and Commercial did not pay for damages to Pourzandvakil's property, harassed her and cancelled her policy. Pourzandvakil does not mention Hirman in her complaint, but Hirman's attorney states that Pourzandvakil informed him in a telephone conversation that her complaint against Hirman stemmed from actions it took as an agent of Travelers in denying Pourzandvakil's 1985 property damage claim.

The moving insurance companies argue that this court has no jurisdiction over the state insurance law claims absent complete diversity of citizenship between plaintiff and the defendants. 28 U.S.C. § 1332. They point out that plaintiff lists a Syracuse, New York address for herself and that Kuwait's [\*18] address as listed in the complaint is also in New York. Therefore, they argue, there is no complete diversity and this court lacks subject matter jurisdiction absent a basis for pendent jurisdiction under 28 U.S.C. § 1337(a). *Section 1367(a)* [HN7] requires a relationship between the state and federal claims so that "they form part of the same case or controversy." *Id.* Because plaintiff's claims of denial of insurance coverage bear no apparent relationship to her other claims of rape, torture, harassment and kidnapping, we do not believe that an adequate basis for supplemental jurisdiction exists. *Id.* Plaintiff's complaint therefore shows no basis for subject matter jurisdiction against the moving insurance companies, and we dismiss as against them.<sup>6</sup>

6 We ordinarily would offer plaintiff an opportunity to amend her complaint because her submissions and Kuwait's answer indicate two bases on which plaintiff might be able to argue diversity of citizenship. First, although plaintiff lists her address in Syracuse, New York, she also has indicated on the civil cover sheet that she is an Iranian Citizen and we are not aware of her residence status. As a permanent resident, she would be deemed a citizen of the state in which she resides. 28 U.S.C. § 1332(a). However, if she lacks permanent resident status, her citizenship would be considered diverse from that of all the defendants. *Id. § 1332(a)(2)*. Second, Kuwait has submitted an answer in which it claims to be a foreign state within the meaning of 28 U.S.C. §

1603. If Kuwait is correct, plaintiff may have an independent basis for jurisdiction over Kuwait. *See 28 U.S.C. § 1330.* If Pourzandvakil could show subject matter jurisdiction over Kuwait without resort to diversity of citizenship, then Kuwait's residence in New York may not be relevant to the issue of whether this court has diversity jurisdiction under *Section 1332*. Cf. *Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508, 1511-1512 (11th Cir. 1989), cert. denied, 131 L. Ed. 2d 219, 115 S. Ct. 1362 (1995) (holding that the joinder of a non-diverse defendant sued under federal question jurisdiction did not destroy diversity as to the remaining defendant). Here, however, plaintiff's complaint is subject to so many other meritorious defenses -- including complete failure to state a cause of action -- that an amendment would be an exercise in futility. Additionally, plaintiff has not requested permission to amend, proffered an amended pleading, or indeed even supplied an affidavit stating her residency status or alleging a basis of jurisdiction over her claims against Kuwait other than diversity under *28 U.S.C. § 1332*.

[\*19] We also agree with the state defendants that state court decisions may render certain of plaintiff's claims against them unreviewable either because of *res judicata* or lack of subject matter jurisdiction. However, because plaintiff's claims are so generally stated and so lacking in specifics, we are unable to discern at this juncture what parts of her complaint would be outside the jurisdiction of the court. In any case, we already have determined that the state defendants are clearly entitled to dismissal on personal jurisdiction grounds. As for Metmor, we believe that plaintiff may be attempting to state a civil rights claim by alleging a conspiracy to murder in connection with a judge although she fails to articulate an actionable claim. We note that we already have determined, in any case, that Metmor is entitled to dismissal on personal jurisdiction grounds.

#### C. Venue

Metmor, Travelers, Maki, Hirman, Norwest, Olmsted County, C.O. Brown, Schmitz and Mundahl also allege that Pourzandvakil's action is not properly venued in this court. Although these defendants are entitled to dismissal on independent grounds, improper venue also would support dismissal as to these defendants. [\*20] The general venue statute provides that a diversity action, except as otherwise provided by law, may be brought only in

[HN8] (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or

omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

*28 U.S.C. § 1331(a).* Section 1331(b) provides that federal question actions, except as otherwise provided by law, may be brought only in

[HN9] (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

[\*21] *Id. § 1331(b).* The majority of the defendants in this action are residents of Minnesota and all of the events of which Pourzandvakil complains occurred in Minnesota. No defendant resides in the Northern District of New York, and none of the conduct plaintiff complains of occurred in this district. Therefore, venue in the Northern District of New York is clearly improper. [HN10] Where venue is laid in the wrong district, the court "shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." *Id. § 1406(a)*. Because, as we will explain below, Pourzandvakil's complaint not only fails to state a claim upon which relief can be granted but is also frivolous, we do not deem it to be in the interest of justice to transfer this case to another district. [HN11] The purpose of the court's discretionary authority to transfer rather than dismiss in cases of improperly laid venue is "to eliminate impediments to the timely disposition of cases and controversies on their merits." *Minnette v. Time Warner*, 997 F.2d 1023, 1027 (2d Cir. 1993) (holding that it was an improper exercise of discretion to dismiss rather than transfer [\*22] when the statute of limitations on a timely filed complaint ran between filing and dismissal). In this case, as discussed below, a review of the complaint and the plaintiff's submissions on these motions indicates that her claims are frivolous. We therefore dismiss as to the moving defendants both on venue grounds and on the other grounds already identified as applicable. We note also that plaintiff has made claims similar to those in this action against many of the same defendants in the United

States District Court for the District of Minnesota. *Pourzandvakil v. Price*, Civ No. 4-93-207 (D.Minn. 1993). This action was dismissed by Order to Show Cause entered April 12, 1993.

### **III. Failure to State a Claim on Which Relief Can be Granted and Frivolity**

Defendants ASI, Travelers, Hirman, Norwest, C.O. Brown, Olmsted County, Schmitz, Mundahl, Prudential, Metmor, and Youngquist as well as the state defendants have attacked the sufficiency of plaintiff's complaint. Travelers and Hirman urge that the complaint is frivolous while the remaining defendants argue only that the complaint fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*.<sup>7</sup> [HN12] We already [\*23] have dismissed against all the moving parties except ASI on jurisdictional grounds and therefore have the power to address the *Rule 12(b)(6)* issue only on ASI's motion. *See Bell v. Hood*, 327 U.S. 678, 682-83, 90 L. Ed. 939, 66 S. Ct. 773 (1946) (subject matter jurisdiction); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 221 (2d Cir. 1963) (personal jurisdiction). We grant ASI's motion and note in passing that were we empowered to reach the merits regarding the remaining moving defendants, we also would dismiss the complaint against them for failure to state a claim upon which relief can be granted. We also dismiss *sua sponte* as frivolous the complaint against all defendants who have not been granted dismissal previously on jurisdictional grounds.

7 J.C. Penney also submits an affidavit requesting dismissal on this basis and others, but has not filed or served a notice of motion.

Pourzandvakil has not specified a statutory or constitutional basis for her claims against ASI or any of the other [\*24] defendants. She alleges that certain of the insurance company defendants denied her claims for damages without alleging that the denial was in any respect wrongful. She also alleges in general terms that the defendants harassed, tortured, kidnapped and raped her and perhaps were involved in a murder plot but does not supply (1) the dates on which these actions occurred, except to say that they began in 1984 and 1985; (2) the names of the specific defendants involved in any particular conduct; or (3) a description of any particular conduct constituting the harassment, torture or kidnapping. She suggests without further detail that ASI was involved in a plot to murder her by placing her in the Mayo Clinic. Although plaintiff does not allege specific constitutional provisions or statutes that defendants have violated, we assume -- largely because many of the defendants involved are state officials or state employees and she appears to complain of certain aspects of various trials -- that she wishes to complain of violations of her civil rights. [HN13] Complaints that rely on civil rights statutes are insufficient unless "they contain some specific allegations of fact indicating a deprivation [\*25]

of rights, instead of a litany of general conclusions that shock but have no meaning." *Barr v. Abrams*, 810 F.2d 358, 363 (2d Cir. 1987). [HN14] A *pro se* plaintiff's complaint must be construed liberally and should be dismissed only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Estelle v. Gamble*, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976) (quotation omitted). Pourzandvakil has not satisfied even this minimal test; her complaint and submissions on this motion demonstrate that she cannot prove any set of facts in support of her claim which would entitle her to relief. Her complaint consists of a "litany of general conclusions" rather than "specific allegations of fact". *Barr*, 810 F.2d at 363.

Ordinarily we would allow plaintiff an opportunity to replead to state specific allegations against ASI, but three factors militate against this course of action. First, our December 22, 1994, Memorandum - Decision and Order denying plaintiff's request for a temporary restraining order indicated that she had not shown a likelihood of success on the merits of her claim because she had not [\*26] pled any specific actionable facts. Despite the fact that plaintiff since has filed three amended complaints, she still fails to set forth specific actionable conduct. Second, the defendants' motions themselves have alerted plaintiff to the need to show specific actionable facts, and yet her voluminous submissions in opposition to the motions contain no specific actionable facts. Finally, plaintiff has asserted similar allegations against many of the same defendants sued in this action -- although not ASI -- as well as others in several different jurisdictions. *See Pourzandvakil v. Blackman*,<sup>8</sup> Civ. No. 94-C944 (D.D.C. 1994), *Pourzandvakil v. Doty* (E.D.N.Y. 1993), *Pourzandvakil v. Price*, Civ. No. 7 (D.Minn. 1993). Where the results are known to us these actions resulted in dismissals for failure to state a claim upon which relief can be granted. *Pourzandvakil v. Price*, Civ. No. 4-93-207, Order to Show Cause entered April 12, 1993; *Pourzandvakil v. Blackman*, Civ. No. 94-C-94, Order entered April 28, 1994, *aff'd* Civ. No. 94-5139 (D.C. Cir. 1994) (per curiam). In the Minnesota case, dismissal took place after the district court offered plaintiff an opportunity to [\*27] amend her pleading and plaintiff still was not able to offer specifics.<sup>9</sup> [HN15] Even *pro se* complaints must show "some minimum level of factual support for their claims." *Pourzandvakil v. Blackman*, Civ. No. 94-C-94, (quoting *White v. White*, 886 F.2d 721, 724 (4th Cir. 1989)). We therefore dismiss plaintiff's complaint against ASI for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*.

8 Former Supreme Court Justice Harry A. Blackmun.

9 We note also that plaintiff has not requested leave to amend in this action.

We note that in *Pourzandvakil v. Blackman*, Judge John H. Pratt dismissed plaintiff's *in forma pauperis* complaint *sua sponte* under 28 U.S.C. § 1915(d), holding both that it failed to state a claim on which relief can be granted and that it was frivolous. We consider here whether we have the authority to dismiss *sua sponte* plaintiff's complaint, which was not filed *in forma pauperis*, as frivolous as against all non-moving defendants. [\*28] [HN16] The Supreme Court explicitly has acknowledged a district court's power under *Section 1915(d)* to dismiss as frivolous a complaint which "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989). The Supreme Court explicitly declined to rule, however, on whether a district court has the authority to dismiss *sua sponte* frivolous complaints filed by non-indigent plaintiffs. *Id.* at 329 n.8. The law in this circuit is that a district court may *sua sponte* dismiss a frivolous complaint even if the plaintiff has paid the filing fee. *See Tyler v. Carter*, 151 F.R.D. 537, 540 (S.D.N.Y. 1993), *aff'd* 41 F.3d 1500 (2d Cir. 1994); *cf. Pillay v. I.N.S.*, 45 F.3d 14, 17 (2d Cir. 1995) (*per curiam*) (dismissing *sua sponte* appeal for which appellant had paid normal filing fee). We believe that *sua sponte* dismissal is appropriate and necessary here because (1) plaintiff's claims lack an arguable basis in law and fact; (2) plaintiff has repeatedly attempted to replead her claims without being able to articulate actionable conduct; (3) some of plaintiff's claims have been tested in other courts [\*29] and found to be without merit; and (4) the issue of frivolity has been presented by at least some of the moving defendants.

We therefore dismiss with prejudice plaintiff's complaint as frivolous as to all defendants -- regardless of whether they have moved for dismissal -- that have not been granted dismissal on jurisdictional grounds. We direct the clerk to return plaintiff's filing fee to her. *Tyler*, 151 F.R.D. at 540.

#### **IV. Requests for Sanctions, Costs, Attorney's Fees and Injunction Against Filing Further Actions**

Because plaintiff is *pro se* and appears to have a belief in the legitimacy of her complaint, we do not believe that the purpose of Rule 11 would be served by awarding sanctions. *See Carlin v. Gold Hawk Joint Venture*, 778 F. Supp. 686, 694-695 (S.D.N.Y. 1991). Moreover, her litigiousness has not yet reached the point

at which courts in this circuit have justified injunctive relief. *See id.* at 694 (and collected cases). We therefore deny the requests of ASI and Prudential for injunctive relief. Our refusal to grant sanctions and injunctive relief however, is conditioned on this dismissal putting an end to plaintiff's attempts to sue these defendants [\*30] on these claims in this forum. Any further attempts by plaintiff to revive these claims will result in our revisiting the issue of sanctions. *Id.* at 695.

#### **CONCLUSION**

All defaults entered by the clerk are vacated. Plaintiff's complaint is dismissed in its entirety against all moving and non-moving defendants. The dismissal of the complaint against Maki, the state defendants, Olmsted County, Schmitz, Mundahl, C.O. Brown, Norwest, Metmor, Restovich, Youngquist, Commercial, Travelers and Hirman is without prejudice as it is premised on this court's lack of power either over the person of the defendant or the subject matter of the controversy. *See Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188-9 (5th Cir. 1986) (dismissal for lack of subject matter jurisdiction is not a dismissal on the merits); *John Birch Soc'y. v. National Broadcasting Co.*, 377 F.2d 194, 199 n.3 (2d Cir. 1967) (dismissal for lack of subject matter jurisdiction implies no view of merits); *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871, 875 (3d Cir.) *cert. denied*, 322 U.S. 740, 88 L. Ed. 1573, 64 S. Ct. 1057 (1944) (dismissal for lack of personal jurisdiction is not [\*31] a dismissal on the merits). The dismissals against the remaining defendants are with prejudice. All requests for sanctions and attorney's fees are denied. The requests of defendants ASI and Prudential for an injunction with respect to future litigation is denied. However, plaintiff is cautioned that any litigation in this forum attempting to revive the claims addressed herein may subject her to sanctions. Plaintiff's motions are denied as moot.

IT IS SO ORDERED.

DATE: May 22, 1995

Syracuse, New York

ROSEMARY S. POOLER

UNITED STATES DISTRICT JUDGE

